Reports of Cases

JUDGMENT OF THE GENERAL COURT (Third Chamber)

11 July 2014*

(State aid — Public service broadcasting — Aid planned by Spain for RTVE — Alteration of the funding scheme — Replacement of advertising revenues by new taxes on television and telecommunications operators — Decision declaring the aid compatible with the internal market — Fiscal measure constituting the method by which the aid measure is financed — Tax necessarily hypothecated to the aid — Direct impact of the revenue from the tax on the amount of the aid — Proportionality)

In Case T-533/10,

DTS Distribuidora de Televisión Digital, SA, established in Tres Cantos (Spain), represented by H. Brokelmann and M. Ganino, lawyers,

applicant,

supported by

Telefónica de España, SA, established in Madrid (Spain),

Telefónica Móviles España, SA, established in Madrid,

represented by F. González Díaz and F. Salerno, lawyers,

interveners,

v

European Commission, represented by G. Valero Jordana and C. Urraca Caviedes, acting as Agents,

defendant,

supported by

Kingdom of Spain, represented initially by J. Rodríguez Cárcamo and M. Muñoz Pérez, subsequently by M. Muñoz Pérez, subsequently by S. Centeno Huerta and N. Díaz Abad, subsequently by Díaz Abad and finally by M. Sampol Pucurull, abogados del Estado,

and by

* Language of the case: Spanish.

Corporación de Radio y Televisión Española, SA (RTVE), established in Madrid, represented by A. Martínez Sánchez and J. Rodríguez Ordóñez, lawyers,

interveners,

APPLICATION for the annulment of Commission Decision 2011/1/EU of 20 July 2010 on the State aid scheme C 38/09 (ex NN 58/09) which Spain is planning to implement for Corporación de Radio y Televisión Española (RTVE) (OJ 2011 L 1, p. 9),

THE GENERAL COURT (Third Chamber),

composed of O. Czúcz (Rapporteur), President, I. Labucka and D. Gratsias, Judges,

Registrar: T. Weiler, Administrator,

having regard to the written procedure and further to the hearing on 15 October 2013,

gives the following

Judgment

1 In this action, the applicant DTS Distribuidora de Televisión Digital, SA seeks the annulment of Commission Decision 2011/1/EU of 20 July 2010 on the State aid scheme C 38/09 (ex NN 58/09) which Spain is planning to implement for Corporación de Radio y Televisión Española (RTVE) (OJ 2011 L 1, p. 9) ('the contested decision'). In that decision, the Commission found that the scheme for funding Corporación de Radio y Televisión Española, SA (RTVE), altered by the Kingdom of Spain by Ley 8/2009, de 28 de agosto, de financiación de la Corporación de Radio y Televisión Española (Law No 8/2009 of 28 August 2009 on the funding of RTVE, BOE No 210 of 31 August 2009, p. 74003, hereafter 'Law No 8/2009'), amending Ley 17/2006, de 5 de junio, de la radio y la televisión de titularidad estatal (Law No 17/2006 of 5 June 2006 on state-owned radio and television, BOE No 134 of 6 June 2006, p. 21270, hereafter 'Law No 17/2006'), was compatible with the internal market under Article 106(2) TFEU.

Background to the dispute and the contested decision

2 The applicant is a company specialising in the management and operation, on the Spanish market, of a digital satellite pay-TV service (Digital +) and in the development of special-interest channels.

3 RTVE is the Spanish public radio and television broadcasting organisation. Under Law No 17/2006 it was entrusted with a public service remit in those fields.

4 Law No 17/2006 established a dual funding scheme for RTVE. Under that law, RTVE received revenue from its commercial activities, and in particular from the sale of advertising space, and payments from the Spanish State as compensation for the fulfilment of its public service remit. That funding scheme ('RTVE's existing funding scheme') was approved by the Commission of the European Communities in Decision C(2005) 1163 final of 20 April 2005 on State aid to RTVE (E 8/05) (summarised in OJ 2006 C 239, p. 17) and Decision C(2007) 641 final of 7 March 2007 on the funding of measures to reduce staff numbers at RTVE (NN 8/07) (summarised in OJ 2007 C 109, p. 2).

5 On 22 June 2009, the Commission received a complaint drawing attention to the bill which was to become Law No 8/2009. On 5 August 2009, the Commission requested the Kingdom of Spain to provide it with information about that bill.

6 Law No 8/2009, which entered into force on 1 September 2009, altered RTVE's existing funding scheme.

7 First of all, Law No 8/2009 provided that, as from the end of 2009, advertising, teleshopping, sponsorship and pay-per-view services would no longer be sources of funding for RTVE. The only commercial revenue that would continue to be available to RTVE after that date would be the income which it derived from the provision of services to third parties and from the sale of its own productions (Article 2(1)(e) of Law No 8/2009). That revenue amounted to approximately EUR 25 million (recital 9 to the contested decision).

8 Next, in order to offset the loss of its other commercial revenue, Law No 8/2009 introduced or modified, in Article 2(1)(b) to (d) and Articles 4 to 6 thereof, the following three fiscal measures:

— a new tax of 3% of the revenues of free-to-air TV broadcasters and 1.5% of the revenues of pay-TV broadcasters established in Spain, the contribution from that tax to RTVE's budget being limited to 15% (in the case of free-to-air TV) and 20% (in the case of pay-TV) of the total annual support for RTVE and any surplus tax revenue being paid into the general budget of the Spanish State (Article 2(1)(d) and Article 6 of Law No 8/2009);

— a new tax of 0.9% of gross operating revenues (excluding those obtained in the wholesale reference market) of telecommunications services operators established in Spain, registered in the register of operators of the Spanish telecoms regulator, operating nationwide or in more than one Autonomous Community of the Spanish State and providing audiovisual services or any other service that includes advertising, derived from any of the following services: fixed telephony, mobile telephony and Internet access provision, this contribution to the total annual support for RTVE being limited to 25% and any surplus tax revenue beyond that percentage being paid into the general budget of the Spanish State (Article 2(1)(c) and Article 5 of Law No 8/2009);

— a share of 80%, up to a maximum amount of EUR 330 million, of the already existing levy on radio spectrum use, any remainder being paid into the general budget of the Spanish State and that percentage being amenable to modification in accordance with the laws relating to the general budget of the Spanish State (Article 2(1)(b) and Article 4 of Law No 8/2009).

9 In addition, the public service compensation provided for by Law No 17/2006 was maintained (Article 2(1)(a) of Law No 8/2009). Accordingly, in the event that the abovementioned sources of funding (together with a number of other, minor sources provided for in Article 2(1)(f) to (i) of Law No 8/2009) should prove insufficient to cover the whole of RTVE's costs of performing its public service duties, the Spanish State was required, under Article 2(2) of Law No 8/2009 and Article 33 of Law No 17/2006, to make good the shortfall. RTVE's dual funding scheme was thus transformed into an almost entirely publicly funded scheme ('the quasi-public funding scheme').

10 Finally, Article 3(2) of Law No 8/2009 established a ceiling for RTVE's income, limiting it, in 2010 and 2011, to EUR 1 200 million annually, that sum also representing RTVE's maximum expenditure in each of those financial years. The maximum increase in that amount was set at 1% for the three years 2012 to 2014 and, for subsequent years, the increase was to be based on the annual consumer price index.

11 Law No 8/2009 also altered the definition of the public service broadcasting mandate entrusted to RTVE. In particular, it established additional obligations for RTVE relating to children's programmes. It also set limits on the acquisition of broadcasting rights for sports events and on the broadcasting at peak viewing times of films produced by major international producers.

12 On 2 December 2009, the Commission informed the Kingdom of Spain of its decision to initiate the procedure laid down in Article 108 TFEU with regard to the alteration of RTVE's funding scheme ('the decision to initiate the formal investigation procedure'), (summarised in OJ 2010 C 8, p. 31). The Commission invited interested parties to submit their observations on the measure in question.

13 On 18 March 2010, the Commission commenced proceedings for failure to fulfil obligations under Article 258 TFEU, on the ground that the tax imposed on electronic communications was contrary to Article 12 of Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) (OJ 2002 L 108, p. 21). In a reasoned opinion, the Commission was to request the Kingdom of Spain, on 30 September 2010, to abolish the tax on the ground of its incompatibility with that directive.

14 On 20 July 2010, the Commission adopted the contested decision in which it declared that the alteration of RTVE's funding scheme brought about by Law No 8/2009 was compatible with the internal market under Article 106(2) TFEU. It based its decision, in particular, on the finding that the three fiscal measures introduced or modified by Law No 8/2009 were not an integral part of the new elements of the aid established by that law and that any incompatibility of those fiscal measures with the Authorisation Directive did not therefore affect its assessment of the funding scheme's compatibility with the internal market. In addition, it took the view that RTVE's modified funding scheme was consistent with Article 106(2) TFEU, in that it was proportional.

The procedure before the General Court

15 By application lodged at the Registry of the General Court on 24 November 2010, the applicant brought the present action.

16 By two separate documents lodged at the Court Registry that same day, the applicant requested the suspension of operation of the contested decision pursuant to Article 278 TFEU and submitted an application for the case to be dealt with under the expedited procedure pursuant to Article 76a of the Rules of Procedure of the General Court.

17 By decision of 18 January 2011, the Court rejected the application for the case to be dealt with under the expedited procedure.

18 By document lodged at the Court Registry on 15 February 2011, the Kingdom of Spain applied for leave to intervene in these proceedings in support of the Commission.

19 By document lodged at the Court Registry on 16 February 2011, RTVE applied for leave to intervene in these proceedings in support of the Commission.

20 By orders of 21 and 23 March 2011, the Kingdom of Spain and RTVE were granted leave to intervene in support of the form of order sought by the Commission.

21 By document lodged at the Court Registry on 22 March 2011, Telefónica de España, SA and Telefónica Móviles España, SA applied for leave to intervene in these proceedings in support of the form of order sought by the applicant.

22 By order of 28 June 2011, Telefónica de España, SA and Telefónica Móviles España, SA were granted leave to intervene in support of the form of order sought by the applicant.

23 By order of the President of the General Court of 9 June 2011, the application for interim measures was dismissed and the costs reserved.

24 On hearing the report of the Judge-Rapporteur, the Court (Third Chamber) decided to open the oral procedure. The parties presented oral argument and gave their replies to the questions asked by the Court at the hearing on 15 October 2013.

25 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs of the present proceedings.

— order RTVE to pay the costs.

— order the Kingdom of Spain to pay the costs.

26 Telefónica de España and Telefónica Móviles España contend that the Court should:

— uphold the applicant's claims and consequently annul the contested decision;

— in any event, order the Commission to pay the costs.

27 The Commission contends that the Court should:

— declare the application partially inadmissible;

— in any event, dismiss the action as unfounded;

— order the applicant to pay the costs;

— order Telefónica de España and Telefónica Móviles España to pay the costs.

28 The Kingdom of Spain and RTVE contend that the Court should:

— declare the application partially inadmissible;

— in any event, dismiss the action;

— in any event, order the applicant to pay the costs.

Law

29 The action is based on three pleas in law, alleging, first, misapplication of the concept of aid, secondly, infringement of Article 106(2) TFEU and, thirdly, infringement of Articles 49 TFEU and 63 TFEU.

1. *Admissibility of the action*

30 The Kingdom of Spain maintains that the action is inadmissible, in that the applicant has no interest in bringing proceedings. Its action concerns the merits of the contested decision and it would, therefore, need to be individually concerned by the contested decision. However, its position on the market is not substantially affected by Law No 8/2009.

31 The Commission, supported by the Kingdom of Spain and RTVE, argues that the action is partly inadmissible. It submits that the applicant has an interest in bringing annulment proceedings only in so far as concerns the parts of the contested decision that relate to the contributions which it is required to make, that is to say, the contributions which it must make as an operator of a digital satellite pay-TV service. On the other hand, it has no interest in seeking the annulment of the contested decision in so far as it concerns either the contributions which it would in any event have to pay, regardless of how those sums are allocated, or contributions which it is not required to pay. Each of the contributions provided for by Articles 4 to 6 of Law No 8/2009 is, according to the Commission, separable from the others. The annulment of any one of them therefore has no effect on the others.

32 The applicant disputes those arguments.

33 Suffice it to recall, in this connection, that the Courts of the European Union are entitled to assess, according to the circumstances of each case, whether the proper administration of justice justifies the dismissal of an action on its merits without first ruling on its admissibility (Case C-23/00 P *Council* v *Boehringer* [2002] ECR I-1873, paragraphs 51 and 52).

34 In the circumstances of the present case, the Court considers that, in the interests of procedural economy, the applicant's claim for annulment should be considered at the outset, without first ruling on the admissibility of the action, since the action is, in any event, wholly unfounded, for the reasons set out below.

2. *Substance*

35 It is appropriate to begin by examining the first plea, alleging misapplication of the concept of aid, then the third plea, alleging infringement of Articles 49 TFEU and 64 TFEU and lastly the second plea, alleging infringement of Article 106(2) TFEU.

The first plea, alleging misapplication of the concept of aid, within the meaning of Article 107 TFEU, in so far as concerns the dissociable nature of the three fiscal measures introduced or modified by Law No 8/2009

36 The first plea relates to the reasons set out in recitals 61 to 66 to the contested decision, in which the Commission concluded that the three fiscal measures introduced or modified by Law No 8/2009 did not form an integral part of the aid measure introduced by that law.

37 In recital 61, the Commission noted that, under Law No 8/2009, the switch from RTVE's dual funding scheme to a quasi-public funding scheme was accompanied by the introduction or modification of three fiscal measures the purpose of which was to generate the necessary revenue. In recital 62, the Commission noted that, where a tax forms an integral part of aid, it must consider the method by which the aid measure is financed and may declare an aid scheme compatible with the internal market only if it complies with EU law. In recital 63, the Commission observed that, in order for a tax to be regarded as forming an integral part of an aid measure, it must be hypothecated to the financing of the aid, in the sense that the revenue from the tax is necessarily allocated to the financing of the aid and has a direct impact on the amount of the aid.

38 In recital 64 to the contested decision, the Commission found that the amount of aid for RTVE was set with regard only to RTVE's financing needs and the estimated net costs of providing the public broadcasting service. In fact and in law, the funding received by RTVE was independent from the revenue generated by the taxes, since such funding depended only on the net costs of the public service obligation. The planned overall funding of RTVE's public service mandate did not depend on the amount of the specific tax revenues, but was in any event to be ensured by the general State budget. The Commission observed that, on the one hand, the revenue generated by the taxes which

was to be allocated to the funding of RTVE could not exceed the net costs of the public service obligation, any excess over the net cost of that public service having to be paid back to the general State budget. On the other hand, it found that, if the net costs of the public service obligation exceeded the revenue generated by the taxes in question, the shortfall would be made up by contributions from the general State budget. Higher or lower than expected revenues from the new taxes would not lead to changes in the projected amounts. Should the revenue from the new tax sources not be sufficient to cover the funding gap left by the abolition of advertising, the missing funds would be contributed from that same general State budget, in accordance with Article 33 of Law No 17/2006.

39 Furthermore, in recital 65 to the contested decision, the Commission observed that the fact that the link between the taxes and the purpose for which they were introduced was mentioned in the explanatory memorandum and in Law No 8/2009 itself did not alter that conclusion. The wording used in the law did not define the nature of the link between the taxes and the aid.

40 Lastly, in recital 66 to the contested decision, the Commission concluded that the three fiscal measures introduced or modified by Law No 8/2009 were not an integral part of the aid and that any incompatibility with the Authorisation Directive would not, therefore, affect its decision on the compatibility of the aid measure with the internal market.

41 The applicant, along with Telefónica de España and Telefónica Móviles España, submit that the Commission's conclusion is mistaken. The three fiscal measures introduced or modified by Law No 8/2009, and in particular the measure provided for in Article 6 of that law, form an integral part of the aid elements introduced by the law. In the contested decision, the Commission should, therefore, have examined the compatibility of the three new fiscal measures with EU law.

42 This plea falls into three parts. First, the applicant, Telefónica de España and Telefónica Móviles España argue that the Commission failed to give sufficient consideration to the connection between the three fiscal measures introduced or modified by Law No 8/2009 and the aid elements introduced by that law. Secondly, the applicant maintains that, in the present case, the indivisible link between the aid elements and the fiscal measures is also clear from the fact that the competitive advantage enjoyed by RTVE over competing undertakings that have to pay the taxes increases in proportion to the amounts levied. Thirdly, the applicant argues that the statement of reasons for the contested decision is contradictory.

The first part of the first plea, alleging a failure to give sufficient consideration to the connection between the three fiscal measures and the aid elements

43 The applicant argues that, applying the conditions to which the Commission referred in the contested decision, namely that the revenue from the tax must necessarily be allocated to the funding of RTVE and must affect the amount of the aid, the Commission should have found that the fiscal measure provided for in Article 6 of Law No 8/2009 formed an integral part of the support for RTVE. In the case of that tax, the abovementioned conditions are fulfilled. First of all, it is clear from Article 6(8) of the law that the tax must necessarily be allocated to the funding of RTVE. It is sufficient if part of the tax forms an integral part of the aid. Next, contrary to the Commission's position, the tax levies provided for in Article 6(8) of the law directly affect the amount of the aid. First, the revenue from the tax is always allocated entirely to the funding of RTVE. Secondly, it is apparent from the explanatory memorandum for Law No 8/2009 that, if the revenues of the operators increase, the amounts levied will also increase. Since RTVE is a competitor of the undertakings which must pay the tax, the higher the tax, the greater the advantage for RTVE resulting from the payment of the tax by its competitors. Thirdly, in previous decisions, the Commission has found there to be an inseparable connection between taxes and aid measures.

44 For their part, Telefónica de España and Telefónica Móviles España argue that the Commission applied the wrong criteria in reaching its conclusion that the aid measure is dissociable from its financing. They submit that, in order for its method of financing to form an integral part of aid, it is sufficient if the tax levy for the financing of the aid is allocated to the beneficiary of the aid. Contrary to what the Commission argues, it is not necessary for a fiscal measure to have a direct impact on the amount of the aid. That is merely one factor among many. According to Telefónica de España and Telefónica Móviles España, not only do the applicant's arguments demonstrate that the tax levy is allocated to the beneficiary, the interdependency between the aid and the tax is also confirmed by other factors. In this context, they mention that RTVE has complained that any failure to pay on the part of private operators or any error in the calculation of their contributions would cause it cash-flow difficulties and that the Spanish State is not prepared to make good any such deficit using funds from its own budget. Moreover, Telefónica de España and Telefónica Móviles España submit that the Commission, which has itself concluded that the tax imposed on telecommunications operators by Law No 8/2009 is contrary to EU law, should have proven that the Spanish State has undertaken to finance RTVE's entire budget in the event that the tax is held to be unlawful. However, it is apparent from Law No 8/2009 that private operators must bear that economic burden. The abolition of the levy would entail the loss of the specific source of financing the aid, and that demonstrates the connection between the aid and the tax.

45 The Commission, supported by the Kingdom of Spain and RTVE, contests those arguments.

46 In this connection, it is appropriate first of all to recall the conditions which must be fulfilled in order for the method of financing aid to be regarded as forming an integral part of that aid, before going on to examine whether, in the present case, the Commission erred in the application of those conditions.

– The conditions which must be fulfilled in order for the method of financing aid to be regarded as forming an integral part of the aid

47 In recital 63 to the contested decision, the Commission stated that, in order for its method of financing to be regarded as forming an integral part of an aid measure, first, the revenue from the charge in question must necessarily be allocated to the financing of the aid and, secondly, it must have a direct impact on the amount of the aid.

48 In must be borne in mind in this context that the FEU Treaty establishes a clear distinction between, on the one hand, the rules on State aid, which are laid down in Articles 107 TFEU to 109 TFEU and, on the other, the rules concerning the distortions which arise from differences between the laws, regulations or administrative provisions of the Member States and, in particular, their tax provisions, which are laid down in Articles 116 TFEU and 117 TFEU (see, to that effect, Case C-174/02 *Streekgewest* [2005] ECR I-85, paragraph 24).

49 Accordingly, fiscal measures which serve to finance an aid measure do not, in principle, fall within the scope of the provisions of the FEU Treaty concerning State aid (see, to that effect, Case C-175/02 *Pape* [2005] ECR I-127, paragraph 14, and *Streekgewest*, paragraph 48 above, paragraph 25).

50 However, where fiscal measures constitute the method of financing an aid measure in such a way that they form an integral part of that measure, the Commission cannot separate its examination of the aid from the effects of the method of financing it, since, in such a situation, any incompatibility with EU law of the method of financing might affect the compatibility of the aid scheme with the internal market (*Pape*, paragraph 49 above, paragraph 14, and *Streekgewest*, paragraph 48 above, paragraph 25).

51 As regards the criteria for deciding whether and aid measure and the method of financing it are indissociable, it is clear from the case-law of the Court of Justice that the charge must be hypothecated to the aid in question under the relevant national rules, in the sense that the revenue from the charge is necessarily allocated to the financing of the aid and has a direct impact on the amount of the aid and, consequently, on the assessment of the compatibility of that aid with the internal market (Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* [2006] ECR I-5293, paragraph 46, and Case C-333/07 *Regie Networks* [2008] ECR I-10807, paragraph 99).

52 That case-law clearly shows, first, that, in order for a tax to be regarded as forming an integral part of an aid measure, there must necessarily be a binding provision of national law which hypothecates the tax to the financing of the aid. It follows that, in the absence of such a provision, a tax cannot be regarded as being allocated to an aid measure and does not, therefore, constitute one of its conditions. Secondly, the mere fact that such a provision exists is not in itself sufficient to establish that a tax does in fact form an integral part of an aid measure. If such a provision of national law does exist, it is also necessary to examine whether the revenue from the tax has a direct impact on the amount of the aid.

53 Contrary to what Telefónica de España and Telefónica Móviles España argue, in order for a tax to form an integral part of an aid measure it is not, therefore, sufficient that the revenue generated by the tax is necessarily allocated to the financing of the aid.

54 As regards the case-law on which Telefónica de España and Telefónica Móviles España rely in support of their arguments, it must be observed that none of the judgments they mention supports their argument that, in order to prove that a method of financing forms an integral part of an aid measure, it is sufficient to show that the levy collected on the basis of the fiscal measure is allocated to the beneficiary of the aid.

55 In this context, Telefónica de España and Telefónica Móviles España put forward the fact that, in certain of its judgments, the Court of Justice has held that the fiscal measure must be hypothecated to the aid measure and that, if such a binding connection exists, the revenue from the fiscal measure has a direct impact on the amount of the aid.

56 Contrary to the argument of Telefónica de España and Telefónica Móviles España, however, it cannot be inferred from the judgments on which they rely (*Streekgewest*, paragraph 48 above, paragraph 26, *Pape*, paragraph 49 above, paragraph 15, Joined Cases C-128/03 and C-129/03 *AEM and AEM Torino* [2005] ECR I-2861, paragraphs 46 and 47, and 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, paragraph 40) that the direct impact of the fiscal measure on the amount of the aid is not a requisite condition but merely one factor among many. On the contrary, in *Streekgewest*, paragraph 48 above (at paragraph 28), the Court did not restrict itself to examining whether the fiscal measure was hypothecated to the aid measure, but also examined whether the revenue from the fiscal measure had a direct impact on the amount of the aid in question.

57 It is also appropriate to point out that, in the judgments in which the Court held there to be an inseparable link between the aid measure and the method by which it was financed, without expressly mentioning the requirement that the fiscal measure must have a direct impact on the amount of the aid (Joined Cases C-261/01 and C-262/01 *van Calster and Others* [2003] ECR I-12249, paragraph 55, and Joined Cases C-34/01 to C-38/01 *Enirisorse* [2003] ECR I-14243, paragraph 47), that requirement was already satisfied.

58 The Commission did not, therefore, err in law by finding that, in order for its method of financing to form an integral part of an aid measure, the charge in question must be hypothecated to the aid, in the sense that the revenue generated by the charge is necessarily allocated to the financing of the aid and has a direct impact on the amount of the aid.

59 Therefore, the arguments put forward by Telefónica de España and Telefónica Móviles España concerning the conditions which the Commission regarded as applicable in determining whether the method of financing aid forms an integral part of the aid must be rejected.

– The application of those conditions

60 While not expressly calling into question the conditions which the Commission applied, the applicant argues that the Commission ought to have reached the conclusion that, in so far as Article 6 of Law No 8/2009 is concerned, those conditions were fulfilled.

61 For their part, Telefónica de España and Telefónica Móviles España first of all put forward arguments to show that the fiscal measures introduced or modified by Law No 8/2009 were hypothecated to the aid elements introduced by that law.

62 As was stated in paragraphs 51 to 58 above, in order for a fiscal measure to form an integral part of aid, it is not sufficient for there simply to be hypothecation between the fiscal measure and the aid. It is also necessary for the fiscal measure's direct impact on the amount of the aid to be established.

63 In this context, the Court would observe that, not only does the applicant put forward arguments to demonstrate that the three fiscal measures introduced or modified by Law No 8/2009 have a direct effect on the amount of aid to be given to RTVE, but also some of the arguments which Telefónica de España and Telefónica Móviles España put forward may be understood as relating not only to the requirement of hypothecation between the fiscal measure and the funding of RTVE, but also to the requirement of proof that the fiscal measure has a direct impact on the amount of the aid.

64 It is therefore appropriate to consider, initially, whether the arguments put forward by the applicant and by Telefónica de España and Telefónica Móviles España are capable of calling into question the Commission's conclusion that the revenue generated by the three fiscal measures introduced or modified by Law No 8/2009 has no direct effect on the amount of aid to be given to RTVE.

65 It is important to bear in mind in this connection that, under Law No 8/2009, the amount of aid to be given to RTVE is fixed by reference to the net costs of performing the public service broadcasting mandate conferred on it. The amount of aid which it receives does not, therefore, depend on the amount of revenue generated by the fiscal measures introduced or modified by that law.

66 In the first place, under Article 33 of Law No 17/2006, as amended by Law No 8/2009, in the event that the income available to RTVE exceeds the costs of performing its public service broadcasting mandate, the surplus is to be reallocated. Any surplus not exceeding 10% of RTVE's annual budgeted costs is to be paid into a reserve fund and any surplus above that ceiling is to be transferred to the Public Treasury.

67 As regards any capital transferred to the reserve fund, it is apparent from Article 8 of Law No 8/2009 that it may be used only with the express authorisation of the Ministry of the Economy and Finance and that, if it is not used within four years, it must serve to reduce the compensation to be drawn from the general budget of the Spanish State. Capital transferred into the reserve fund cannot, therefore, be regarded as having a direct impact on the amount of aid to be given to RTVE.

68 Moreover, Article 3(2) of Law No 8/2009 lays down an absolute limit on RTVE's income, which is set at EUR 1 200 million for 2010 and 2011. Any surplus over and above that ceiling is to be directly re-allocated to the general budget of the Spanish State.

69 In the second place, under Article 2(2) of Law No 8/2009, in the event that the income available to RTVE is insufficient to cover the costs of performing its public service broadcasting mandate, the shortfall is to be made up from contributions from the general budget of the Spanish State.

70 The Commission was therefore right to find that the amount of tax levied under the three fiscal measures introduced or modified by Law No 8/2009 could not have a direct impact on the amount of aid received by RTVE, which is determined by reference to the net costs of providing the public broadcasting service.

71 None of the arguments put forward by the applicant or by Telefónica de España and Telefónica Móviles España is capable of calling that finding into question.

72 First of all, contrary to the submission of Telefónica de España and Telefónica Móviles España, the mere fact that the three fiscal measures introduced or modified by Law No 8/2009 were designed to compensate the loss of RTVE's commercial revenue (see recital 13 to the contested decision) does not prove that the method of financing the aid forms an integral part of the aid measure. Indeed, the Court has already observed that that fact is not in itself sufficient to show that a tax is hypothecated to a tax exemption (*Streekgewest*, paragraph 48 above, paragraphs 26 and 27).

73 Secondly, Telefónica de España and Telefónica Móviles España submit that, even if such an obligation exists in theory, the Spanish State will not in practice be prepared to supplement RTVE's budget with funds from its own general budget.

74 That argument must also be rejected.

75 Suffice it to recall in this context that, according to settled case-law, in an action for annulment under Article 263 TFEU, the legality of a European Union measure must be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted. The assessments carried out by the Commission must be examined only in the light of the information which it had at the time when it made them (Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 7).

76 It must be observed that Telefónica de España and Telefónica Móviles España have failed to adduce any evidence to show that, at the time when it adopted the contested decision, the Commission was in possession of information indicating that the Spanish State was not prepared to supplement RTVE's budget in accordance with Article 2(2) of Law No 8/2009. Indeed, all of the documents they have submitted in this connection post-date the adoption of the contested decision, which was on 20 July 2010.

77 Thirdly, Telefónica de España and Telefónica Móviles España argue that the fiscal measure designed to finance an aid measure may only be regarded as not forming an integral part of that measure if the Commission is able to show that, in the event that the fiscal measure proves to be incompatible with EU law, the Member State in question has undertaken to finance the aid measure in its entirety.

78 That argument must also be rejected.

79 Admittedly, in a case where, on applying the two abovementioned criteria, that is to say the condition relating to hypothecation between the fiscal measure and RTVE's funding and the condition relating to proof that the fiscal measure has a direct impact on the amount of the aid, the fiscal measure must be regarded as forming an integral part of the aid — as in the case of a parafiscal measure pursuant to which all or a specific proportion of a tax levy is allocated directly and unconditionally to the beneficiary of the aid — the incompatibility of the fiscal element will have a direct effect on the aid measure. Indeed, in such a case, the incompatibility or partial incompatibility of the fiscal element of the parafiscal measure will result in the abolition of the aid measure or a reduction in the amount of aid.

80 In this case, Article 2(2) of Law No 8/2009 and Article 33 of Law No 17/2006 provide that, if the sources of funding prove insufficient to cover all of the costs incurred by RTVE in performing its public service obligations, the Spanish State is required to make up the shortfall. In the present case, therefore, the amount of aid does not depend directly on the fiscal measure.

81 Fourthly, the applicant argues that, in an earlier decision to initiate the formal investigation procedure, in a case similar to the present case, the Commission itself favoured the view that the taxes and the aid measure were indissociable.

82 That complaint must be rejected without it being necessary to examine the content of the decision to initiate the formal investigation procedure in question. Indeed, it must be borne in mind, first, that the assessments made by the Commission in a decision to open the formal investigation procedure are merely provisional in nature (Case T-190/00 *Regione Siciliana* v *Commission* [2003] ECR II-5015, paragraph 48). Secondly, the nature of aid, and consequently also the question of whether its method of financing is dissociable from that aid, must be determined by reference to objective criteria and cannot depend on any subjective assessment made by the Commission. Therefore, even if it such an administrative practice had existed previously, it would be contrary to the case-law and the Commission could not, therefore, be bound by it.

83 Fifthly, the applicant argues that the amount of the aid will increase as a result of the charge, since it is a competitor of RTVE and because RTVE's competitive advantage will increase in proportion to the amount of tax which it is charged.

84 That argument must be rejected in so far as it is intended to demonstrate that the Commission erred in the application of the two conditions according to which the revenue from the tax must necessarily be allocated to the financing of the aid and must have a direct impact on the amount of the aid. In accordance with those conditions, it is not sufficient merely to show that the tax levy has an effect on the competitive position of the beneficiary of the aid.

85 In so far as that argument is intended to demonstrate that there is another situation in which the method of financing aid must be regarded as forming an integral part of that aid, it will be considered in the context of the second part of this plea.

86 Consequently, the Commission was right to find that the amount of aid to be given to RTVE did not depend directly on the amount of tax levied on the basis of the fiscal measures introduced or modified by Law No 8/2009.

87 As was stated in paragraph 62 above, in order for the three fiscal measures introduced or modified by Law No 8/2009 to be regarded as forming an integral part of the aid element, the condition relating to hypothecation between the fiscal measure and the aid measure and the condition relating to proof that the fiscal measure has a direct impact on the amount of the aid must both be met.

88 It is therefore unnecessary to examine the arguments which the applicant, Telefónica de España and Telefónica Móviles España put forward to demonstrate that there is hypothecation between the fiscal measure provided for in Article 5 of Law No 8/2009 and RTVE's funding, since they serve no purpose.

89 The first part of the first plea must therefore be rejected.

The second part of the first plea, concerning the relationship between the fiscal measures and RTVE's competitive advantage

90 The applicant argues that, in addition to the situation examined by the Commission in the contested decision, there is another situation in which the method of financing must be regarded as forming an integral part of the aid measure. In a case of asymmetrical imposition, where a tax is imposed solely on certain economic operators, in order to compensate supposed public service obligations, and not on other operators competing with the former, the connection between the aid and the tax is closer than in the situation examined by the Commission. In such a case, the advantage arises from the imposition of the tax on the competitors of the beneficiary undertaking.

91 The applicant submits that there is, in the present case, a close connection of this kind between the tax provided for in Article 6 of Law No 8/2009 and the aid measure. First of all, the tax in question is imposed on it in order to compensate the costs which RTVE incurs in providing the public service. Consequently, RTVE receives aid simply as a result of a competitor being made subject to a tax. The higher the tax, the greater the competitive advantage. Next, the fact that the support for RTVE is not limited to its exempt status but also includes the receipt of the revenue generated by the tax does not call that conclusion into question. It in fact reinforces the connection between the tax and the aid measure, since it reinforces RTVE's competitive advantage. Moreover, when examining the compatibility of aid, it is necessary to examine the effects of the aid in the specific context of the market concerned and thus to take into account the competitive disadvantages of other undertakings.

92 First of all, it is necessary to recall in this connection the distinction drawn in the FEU Treaty between the rules governing State aid, on the one hand, and the rules relating to the tax provisions of the Member States, on the other. According to settled case-law, in principle, persons liable to pay an obligatory contribution cannot rely on the argument that the exemption enjoyed by other persons constitutes State aid in order to avoid payment of that contribution (see Case C-390/98 *Banks* [2001] ECR I-6117, paragraph 80 and the case-law cited).

93 By this line of argument, the applicant seeks to call that principle into question. Indeed, according to the applicant's approach, an undertaking could challenge the levying of any tax solely on the ground that it serves to finance an advantage enjoyed by another undertaking with which it is in a competitive relationship.

94 Admittedly, as the applicant rightly points out, in its judgment of 7 September 2006 in *Laboratoires Boiron* (Case C-526/04, ECR I-7529, paragraphs 27 and 48), the Court held that, if the levying of an obligatory contribution constitutes aid, undertakings that are liable to pay that contribution may oppose its payment.

95 However, contrary to the applicant's submission, it cannot be inferred from that judgment that it is sufficient that an undertaking liable to pay a tax which contributes to financing aid is in a competitive relationship with the beneficiary of the aid in order for the tax to form an integral part of the aid and for that undertaking to be able to oppose its payment.

96 The approach taken by the Court in *Laboratoires Boiron* (paragraph 94 above) was justified in light of the particular circumstances of that case.

97 The case which gave rise to the judgment in *Laboratoires Boiron* (paragraph 94 above) concerned the distribution of medicines in France, where there were two directly competing distribution channels, that of the wholesale distributors and that of the laboratories which sell directly to the public. The tax at issue was charged only on direct sales of medicines by pharmaceutical laboratories. Its objective was to restore the balance of competition between the two distribution channels, which, in the opinion of the French legislature, had been distorted by the imposition of public service obligations on wholesale distributors alone.

98 In its judgment in *Laboratoires Boiron* (paragraph 94 above), the Court took into account two particular aspects of the tax at issue in that case. First, it noted that it was not a tax of general application, but one for which one category of undertakings was liable while undertakings with which that category was in direct competition were not liable (paragraphs 32 to 34 of the judgment). Secondly, it noted that the absence of liability on the part of wholesalers was a deliberate objective, not to say the principal objective of the tax, which was designed to restore the balance of competition between the two distribution channels (paragraph 35 of the judgment).

99 The fiscal measures at issue in the present case, that is to say, the three fiscal measures introduced or modified by Law No 8/2009, are not comparable to those addressed by the judgment in *Laboratoires Boiron* (paragraph 94 above).

100 First, the principal objective of the imposition of the taxes here in issue is not to restore the balance of competition between RTVE and other operators, but to ensure the funding of RTVE.

101 Secondly, the connection between the fiscal measures and the aid measure at issue in this case is looser than in the case which gave rise to the judgment in *Laboratoires Boiron* (paragraph 94 above). In that earlier case, there was an intrinsic link between the fiscal measure and the aid measure which made it impossible to distinguish one from the other. Inasmuch as the aid consisted solely in the imposition of an obligatory contribution on a certain category of undertakings, the inapplicability of the fiscal measure resulting from its incompatibility with EU law would necessarily have entailed its abolition. By contrast, in the present case, the inapplicability of the fiscal measures introduced or modified by Law No 8/2009 by reason of their incompatibility with EU law would not directly undermine the support for RTVE. As was stated in paragraph 80 above, in the event that the method of financing the aid for RTVE should prove incompatible with EU law, then, under Article 2(2) of Law No 8/2009 and Article 33 of Law No 17/2006, the Spanish State will be required to make up the shortfall between the sources of funding available to RTVE and all of the costs incurred by RTVE in performing its public service obligations.

102 Thirdly, it must be emphasised that, in the case which gave rise to the judgment in *Laboratoires Boiron* (paragraph 94 above), the amount of the aid was determined solely by the amount of the tax. As Advocate General Tizzano observed in point 47 of his Opinion in that case, the benefit which the beneficiaries derived from the liability of their competitors to the tax at issue necessarily depended on the amount of that tax charge. By contrast, in the present case, the amount of aid is determined, first and foremost, by the net costs of fulfilling the obligations of the public service mandate. Admittedly, the liability to pay the taxes provided for by Law No 8/2009 is likely to entail an additional competitive disadvantage for private operators competing with RTVE. However, in this connection, the Court has already held that the mere fact that a tax whose purpose is to contribute to the financing of aid is imposed not on the beneficiary of the aid but on other undertakings competing with that beneficiary is not sufficient to support the conclusion that the tax forms an integral part of the aid (*Distribution Casino France and Others*, paragraph 56 above, paragraphs 40 to 43).

103 Therefore, contrary to the applicant's submission, the three fiscal measures introduced or modified by Law No 8/2009 are not comparable to the fiscal measure imposed in the case which gave rise to the judgment in *Laboratoires Boiron* (paragraph 94 above).

104 The Commission did not, therefore, err in concluding, in the contested decision, that the connection between the three fiscal measures introduced or modified by Law No 8/2009 and the aid elements introduced by that law was not sufficiently close for it to be concluded that those fiscal measures formed an integral part of the aid measure.

105 The second part of the first plea must therefore be rejected.

The third part of the first plea, alleging that the Commission's approach was contradictory

106 The applicant maintains that the statement of reasons for the contested decision is contradictory in that, by concluding that the alteration of RTVE's funding scheme had to be notified, in particular, because of the introduction of the tax provided for in Article 6 of Law No 8/2009, the Commission implicitly acknowledged that that tax formed an integral part of the aid measure.

107 Suffice it to observe in this connection that, contrary to the applicant's submission, the Commission did not conclude, in recitals 48 to 55 to the contested decision, that the three fiscal measures introduced by Law No 8/2009 had to be regarded as new aid. In recital 50 to the contested decision the Commission restricted itself to observing that the new sources of public funding introduced by that law constituted new aid elements. There is, however, no contradiction between the Commission's conclusion that the new sources of public funding introduced by Law No 8/2009 constituted new aid elements and its conclusion, set out in recital 66 to the decision, that the three fiscal measures introduced by that law in order to finance those new sources of funding did not form an integral part of the aid.

108 The third part of the first plea must, therefore, be rejected and, consequently, the first plea must be dismissed in its entirety.

The third plea, alleging infringement of Articles 49 TFEU and 63 TFEU

109 By its third plea, the applicant, supported by Telefónica de España and Telefónica Móviles España, argues that the Commission infringed Articles 49 TFEU and 63 TFEU. The tax provided for in Article 6 of Law No 8/2009, which, it submits, forms an integral part of the aid granted to RTVE, is contrary to those provisions of the TFEU.

110 The Commission, supported by the Kingdom of Spain and RTVE, contests those arguments. Moreover, the Commission maintains that some of the arguments put forward by the applicant are inadmissible.

111 Suffice it to observe in this connection that, by its allegation of infringement of Articles 49 TFEU and 63 TFEU, the applicant is arguing that the fiscal measure provided for in Article 6 of Law No 8/2009 is incompatible with those provisions. However, since that fiscal measure did not form an integral part of the aid, the Commission was not required to examine its compatibility with Articles 49 TFEU and 63 TFEU in the context of the procedure leading to the adoption of the contested decision.

112 The third plea must therefore be rejected, without it being necessary to rule on the Commission's objection of inadmissibility.

The second plea, alleging infringement of Article 106(2) TFEU

113 The applicant, supported by Telefónica de España and Telefónica Móviles España, argues that the Commission infringed Article 106(2) TFEU by authorising an aid scheme which does not comply with the principle of proportionality. RTVE's funding scheme distorts competition in the market for acquiring programme content and in the downstream viewers' market, contrary to the general interest. It states that it is in competition with RTVE in the viewers' market and in the market for acquiring programme content. Law No 8/2009, and Article 6 of that law in particular, distorts competition in those markets in a manner that is contrary to the common interest. RTVE enjoys a dual advantage inasmuch as, first of all, its funding has been maintained and even increased and, secondly, the investment capacity of its competitors has been diminished. That advantage enables it to adopt anti-competitive conduct that is not called for by its public service obligations. Two clear examples of RTVE's anti-competitive conduct in the field of film rights are its acquisition of rights

other than those required for broadcasts during the free-TV window, such as the acquisition of exclusive rights to copy films or rights to broadcast films during the pay-TV window and the pressure which RTVE is exerting in order for the duration of pay-TV windows to be reduced. In so far as concerns the broadcasting of premium sporting events, RTVE offers excessive sums for the acquisition of the relevant rights, causing prices to rise artificially to levels which its competitors are unable to match. According to the applicant, RTVE's conduct is also affecting its position in the viewers' market, since its own programming offer is being impoverished, and that is affecting its subscriptions. By contrast with free-to-air TV operators, pay-TV operators do not benefit from the abolition of advertising with RTVE. Furthermore, it is not able to offer 'triple play' services. The restrictions imposed on RTVE are not sufficient to remove these disproportionate distortions of competition. First of all, the prohibition on RTVE's using its revenue in order to outbid it in the context of premium content rights acquisitions is ineffective, since the public service mandate conferred on RTVE includes the acquisition of premium content. Next, the budgetary ceiling on the acquisition of rights for the broadcasting of sporting events is of no effect. In addition, the annual limit on the broadcasting of premium films to 52 recently released films produced by major international film production studios is inadequate. Finally, the limit on the tax imposed on private television operators of 20% of the total annual support for RTVE is of no effect.

114 The Commission, supported by the Kingdom of Spain and RTVE, contests those arguments.

115 It is appropriate, in this connection, to recall, as a preliminary point, the content of Article 106(2) TFEU as well as the legal context of that provision.

116 Pursuant to 106(2) TFEU, undertakings entrusted with the operation of services of general economic interest are subject to the rules contained in the treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. It also provides that the development of trade must not be affected to such an extent as would be contrary to the interests of the Union.

117 In order for State aid, within the meaning of Article 107 TFEU, to be declared compatible with the internal market on the basis of Article 106(2) TFEU, the following conditions must be met: first, the operator in question must be entrusted with a service of general economic interest by an act of a public authority that clearly defines the general economic interest service obligations in question and, secondly, the operator must not receive excessive compensation, nor must the State funding affect competition disproportionately on the external market (see, to that effect, Case T-289/03 *BUPA and Others* v *Commission* [2008] ECR II-81, paragraphs 181 and 222).

118 In the present case, the applicants do not call into question the Commission's finding that RTVE is entrusted with a service of general economic interest by an act of a public authority that clearly defines the general economic interest service obligations.

119 Moreover, the applicant does not specifically call into question the Commission's conclusions as to the absence of any risk of overcompensation. Admittedly, it does state that, under Law No 8/2009, RTVE has more revenue at its disposal than before. However, it makes that point in order to show that RTVE's ability to distort competition has increased.

120 On the other hand, the applicant does maintain that Law No 8/2009 enables RTVE to raise its bids in the market for the acquisition of programme content and that RTVE's funding scheme distorts competition to a degree that is contrary to the common interest.

The first part of the second plea, alleging a risk of anti-competitive conduct on the part of RTVE

121 The applicant argues that the Commission was wrong to approve RTVE's funding scheme, as altered by Law No 8/2009, since there was a risk of RTVE engaging in anti-competitive conduct in the market for the acquisition of rights to broadcast sporting events and films.

122 In this context, it is appropriate to recall the principles in accordance with which the General Court may review a decision of the Commission in the field of public services and, more specifically, in the field of broadcasting.

123 Pursuant to Article 14 TFEU, the Union and the Member States, each within their respective powers and within the scope of application of the treaties, must ensure that services of general economic interest operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. Article 14 TFEU also provides that these principles and conditions are to be established without prejudice to the competence of the Member States, in compliance with the treaties, to provide, to commission and to fund such services.

124 It is apparent from Protocol No 26 on services of general interest, annexed to the EU and FEU Treaties, that one of the shared values of the Union with regard to such services is the wide discretion of national, regional and local authorities in providing, commissioning and organising these services of general economic interest.

125 According to Protocol No 29 on the system of public broadcasting in the Member States, annexed to the EU and FEU Treaties, public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism. It is also clear from that protocol that the provisions of the FEU Treaty are without prejudice to the competence of the Member States to provide for the funding of public service broadcasting in so far as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State and in so far as such funding does not affect trading conditions and competition in the Union to an extent which would be contrary to the common interest, account being taken of the performance of that public service mandate.

126 Accordingly, the Member States enjoy a broad discretion in defining public service broadcasting tasks and in deciding how they are organised (see, by analogy, Joined Cases T-568/08 and T-573/08 *M6 and TF1* v *Commission* [2010] ECR II-3397, paragraph 139).

127 The extent of the Commission's review of the way in which public service broadcasting tasks are defined and of decisions as to how they are organised is therefore limited (see, by analogy, *BUPA and Others* v *Commission*, paragraph 117 above, paragraph 220).

128 As regards the General Court's review of a Commission decision in this field, it is important to bear in mind that the Commission's assessment addresses complex economic facts. The scope of the General Court's review of a Commission decision is therefore even more limited than that of the Commission's assessment of the measure of the Member State in question and is restricted to ascertaining whether the measure in question is manifestly inappropriate, given the objective pursued (see, by analogy, *BUPA and Others* v *Commission*, paragraph 117 above, paragraphs 221 and 222).

129 It is in the light of those considerations that the Court must examine the complaint that the Commission failed to take sufficient account of the risk that RTVE might engage in anti-competitive conduct in the market for the acquisition of rights to broadcast sporting events and films.

130 First of all, in so far as concerns the applicant's argument that the public resources available to RTVE under its funding scheme enable it to compete with private operators in the market for the acquisition of programme content, it must be recalled that Law No 17/2006, as amended by Law No 8/2009,

confers on RTVE a broadcasting mandate which includes the broadcasting of sporting events and films produced by major international film production companies. Given the broad discretion which Member States enjoy in defining public broadcasting services, Article 106(2) TFEU does not preclude Member States from opting for a broad definition of such services or from entrusting broadcasting organisations with a mandate to provide balanced, varied programming which may include the broadcasting of sporting events and films (see, to that effect, Case T-442/03 *SIC* v *Commission* [2008] ECR II-1161, paragraph 201, and Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04 *TV2/Danmark and Others* v *Commission* [2008] ECR II-2935, paragraphs 122 to 124). Therefore, the mere fact that RTVE competes with private operators in the market for the acquisition of programme content, and in some cases prevails over private operators, is not in itself sufficient to demonstrate a manifest error of assessment on the Commission's part.

131 Nevertheless, the applicant rightly points out that it would not be compatible with Article 106(2) TFEU for a broadcaster to behave in an anti-competitive manner toward private operators in the market, for example, by consistently overbidding in the market for the acquisition of programme content. Such conduct could not be regarded as necessary for the performance of its public service mandate.

132 As regards such a risk, it should be noted that the second sentence of Article 3(1) of Law No 8/2009 provides that RTVE may not set aside any of its revenue for the purpose of overbidding, in relation to its competitors, for the acquisition of rights relating to premium content. That provision therefore expressly prohibits RTVE from overbidding. The prohibition is reiterated in Article 43(7) of Law No 7/2010, which entered into force at the same time as the contested decision was adopted and of which the Commission was aware (see recital 75 to the contested decision).

133 Whilst it acknowledges the existence of the second sentence of Article 3(1) of Law No 8/2009, the applicant argues that that does not mean that the possibility of RTVE's consistently overbidding can be ruled out, and the prohibition is therefore ineffective.

134 First of all, the applicant argues that the prohibition on overbidding is of no effect because RTVE's public service mandate includes the acquisition of premium content. Indeed, the very existence of such a prohibition demonstrates that RTVE's conduct is likely to distort competition.

135 That argument cannot succeed.

136 As was made clear in paragraph 130 above, Article 106(2) TFEU does not prevent RTVE from competing with private operators or from acquiring premium content, provided that it does so in the performance of its public service broadcasting mandate.

137 Secondly, the applicant mentions examples of rights acquisitions by RTVE which, it maintains, demonstrate that RTVE overbids.

138 It must be recalled in this connection that, in the contested decision, the Commission restricted itself to examining the compatibility of RTVE's funding scheme, as altered by Law No 8/2009. Therefore, in the General Court's review of the contested decision, the examples mentioned by the applicant may be taken into account only to the extent that they may show that, at the time when it adopted the contested decision, the Commission made a manifest error of assessment with regard to the effectiveness of the prohibition laid down in the second sentence of Article 3(1) of Law No 8/2009 and Article 43(7) of Law No 7/2010.

139 As the applicant has admitted, a great many of the examples which it mentions are of rights acquisitions that RTVE made prior to the entry into force of the prohibition laid down in the second sentence of Article 3(1) of Law No 8/2009.

140 Therefore, even supposing that those examples of rights acquisitions by RTVE demonstrate anti-competitive conduct on RTVE's part, they cannot prove that the Commission made a manifest error of assessment regarding the effectiveness of the prohibition laid down in the second sentence of Article 3(1) of Law No 8/2009 and Article 43(7) of Law No 7/2010.

141 In this context, the Court must also reject the applicant's argument that, even though the examples given are of rights acquisitions which RTVE made prior to the entry into force of the prohibition laid down in the second sentence of Article 3(1) of Law No 8/2009 and Article 43(7) of Law No 7/2010, the effect of those acquisitions will continue into the future. As was stated in paragraph 138 above, the subject of the contested decision was RTVE's funding scheme, as altered by Law No 8/2009, and these acquisitions can have no effect on the compatibility of that funding scheme.

142 Of all the examples of rights acquisitions by RTVE put forward by the applicant in order to demonstrate anti-competitive conduct on RTVE's part, the only example that post-dates the entry into force of the prohibition laid down in the second sentence of Article 3(1) of Law No 8/2009 and Article 43(7) of Law No 7/2010 concerns the free-to-air broadcasting rights for 2012 to 2015 relating to the Union of European Football Associations (UEFA) Champions League. The applicant states that a private operator lodged a complaint with the Spanish authorities alleging that RTVE had overbid in its acquisition of these rights. That fact, the applicant submits, is sufficient to demonstrate the ineffectiveness of the prohibition at issue.

143 This example of rights acquisition by RTVE is not, however, capable of demonstrating that, at the time when it adopted the contested decision, the Commission made a manifest error of assessment regarding the effectiveness of the prohibition laid down in the second sentence of Article 3(1) of Law No 8/2009 and Article 43(7) of Law No 7/2010.

144 Indeed, the acquisition in question took place not only after the entry into force of the prohibition laid down in the second sentence of Article 3(1) of Law No 8/2009 and Article 43(7) of Law No 7/2010, but also after the adoption of the contested decision. According to settled case-law, in the context of an action for annulment under Article 263 TFEU, the legality of a European Union measure must be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted. The assessments carried out by the Commission must be examined only in the light of the information which it had at the time when it made them (*France* v *Commission*, paragraph 75 above, paragraph 7).

145 Furthermore, and in any event, the fact that a private operator may have lodged a complaint with the Spanish authorities cannot in itself demonstrate that the prohibition laid down in the second sentence of Article 3(1) of Law No 8/2009 and Article 43(7) of Law No 7/2010 is not effective. On the contrary, the fact that a private operator is able to request the Spanish authorities to review the observance by RTVE of that prohibition tends to suggest that that prohibition is indeed effective.

146 The examples of rights acquisitions by RTVE which the applicant mentions in order to expose an illicit practice of overbidding on RTVE's part cannot, therefore, call into question the effectiveness of the prohibition laid down in the second sentence of Article 3(1) of Law No 8/2009 and Article 43(7) of Law No 7/2010.

147 Thus, the applicant has failed to show that the Commission made any manifest error of assessment regarding the risk of anti-competitive conduct on RTVE's part in the market for the acquisition of rights for the broadcasting of sporting events and films.

148 It follows that the first part of the second plea must be rejected.

The second part of the second plea, alleging an effect on trade to an extent that is not in the Union's interest

149 The applicant argues that RTVE's funding scheme distorts competition by affecting trade to an extent that is contrary to the common interest.

150 It is necessary, in this context, to distinguish between the arguments which the applicant makes in relation to the effects of the three fiscal measures introduced or modified by Law No 8/2009 and its arguments concerning the effects of the aid elements provided for under RTVE's funding scheme, as amended by that law.

151 The arguments which the applicant makes in relation to the effects of the three fiscal measures introduced or modified by Law No 8/2009 on competition and trade within the Union must be rejected as unfounded. Suffice it to recall that the fiscal measures did not form an integral part of the aid measures introduced by that law and that the Commission was not, therefore, required to take account of their effects in the context of the procedure which led to the adoption of the contested decision, which solely addressed the compatibility of RTVE's funding scheme (see paragraph 111 above).

152 As regards the applicant's arguments concerning the effects of the aid elements provided for under RTVE's funding scheme, as amended by Law No 8/2009, it must first of all be recalled that it is clear from Article 106(2) TFEU that the performance of a public service mandate must not affect trade to such an extent as would be contrary to the interests of the Union and that it is clear from Protocol No 29 on the system of public broadcasting in the Member States, annexed to the EU and FEU Treaties, that the funding of public broadcasting organisations must not affect trading conditions and competition in the Union to an extent which would be contrary to the common interest.

153 It is thus clear from the second sentence of Article 106(2) TFEU and Protocol No 29 on the system of public broadcasting in the Member States, annexed to the EU and FEU Treaties, that an aid scheme may not be justified under the first sentence of Article 106(2) TFEU if it affects trade and competition to an extent that is contrary to the interests of the Union, even if the need for the aid scheme is not in question.

154 As is clear from Protocol No 29 on the system of public broadcasting in the Member States, annexed to the EU and FEU Treaties, in the assessment of the conditions provided for in Article 106(2) TFEU, the performance of the public service broadcasting mandate must be taken into account, inasmuch as it is defined by the Member States and is directly related to the democratic, social and cultural needs of each society and the need to preserve media pluralism.

155 It follows that, in order for an aid scheme for the benefit of an operator entrusted with a public service broadcasting mandate to be regarded as not fulfilling the condition laid down in Article 106(2) TFEU, it must affect trade and competition significantly and to an extent which is manifestly disproportionate to the objectives pursued by the Member States.

156 It is the light of those considerations that the Court must examine the merits of the arguments which the applicant puts forward.

157 First of all, in so far as the applicant argues that RTVE's funding scheme distorts competition because it enables RTVE to compete with private operators with regard to the broadcasting of sporting events and films produced by major international film production companies, suffice it to recall that Article 106(2) TFEU does not preclude a broad definition of public service broadcasting mandates. That fact is not, therefore, sufficient in itself to demonstrate that the condition laid down in the second sentence of Article 106(2) TFEU is not fulfilled.

158 Secondly, the applicant maintains that its business is being affected by RTVE's funding scheme and that this has led to its own programming offer being impoverished and is having an adverse effect on its subscriptions.

159 Even supposing that the harmful effects to which the applicant refers were proven and that they may be imputed to RTVE rather than to the conduct of other private operators with which the applicant competes in the Spanish market, they do not prove that competition and trade are being affected in a way that is manifestly disproportionate to the objectives pursued by the Kingdom of Spain.

160 Indeed, in order to support a finding of such an effect, it would be necessary to establish that RTVE's funding scheme, as altered by Law No 8/2009, renders it impossible or excessively difficult for a private operator to conduct business in the Spanish broadcasting market.

161 In this connection it must be observed that Law No 8/2009 lays down limits on RTVE's activities the purpose of which is to ensure that the business of private operators is not affected disproportionately.

162 First, Article 3(2) of Law No 8/2009 stipulates an upper limit for RTVE's budget of EUR 1 200 million. Therefore, regardless of how its public service mandate is defined and organised, RTVE's economic dimension is confined within limits. As regards that limitation, the Commission observed in recital 71 to the contested decision that the sum of EUR 1 200 million corresponded to the average budget that was available to RTVE under the dual funding scheme and that there was no reason to assume that the abolition of advertising would entail any considerable reduction in RTVE's actual costs.

163 Next, it must be observed that Article 9(1)(i) of Law No 8/2009 provides that RTVE must limit to 10% of its total annual budget for supplies, purchasing and external services the cost of acquiring rights to broadcast official sporting events that are classified as being of general interest and of major importance to the public and which are identified in the programming agreements, with the exception of the Olympic and Paralympic Games.

164 Furthermore, Article 9(1)(m) of that law provides that, in any year, RTVE may not broadcast at peak viewing times, on all of its channels together, more than 52 recently released films produced by major international film production studios, that is to say, films which have already been shown in cinemas and which were released between two and four years previously.

165 The applicant has not, however, explained in what way, despite the limits mentioned in paragraphs 162 to 164 above, it has been made impossible or excessively difficult for private operators to conduct business in the Spanish broadcasting market.

166 Accordingly, the applicant has failed to demonstrate any manifest error of assessment on the Commission's part regarding the condition laid down in the second sentence of Article 106(2) TFEU and in Protocol No 29 on the system of public broadcasting in the Member States, annexed to the EU and TFEU Treaties, that competition and trade must not be affected in a way that is contrary to the interests of the Union.

167 The part of the second plea alleging infringement of the second sentence of Article 106(2) TFEU must therefore be rejected.

The other complaints put forward by Telefónica de España and Telefónica Móviles España in the context of the second plea

168 Telefónica de España and Telefónica Móviles España argue that, in breach of Article 106(2) TFEU and Article 296 TFEU, the Commission authorised RTVE's funding scheme, as altered by Law No 8/2009, even though it entailed a risk of overcompensation, without providing a sufficient statement of reasons

in that regard. Despite the concerns expressed by national authorities regarding the risk of overcompensation, the Commission restricted itself, in recital 71 to the contested decision, to observing that RTVE would continue to be required to attract a large audience and that the abolition of commercials would create a need for additional productions which would have to be financed. In particular, it failed to explain the reasons for which the ceiling on RTVE's budget seemed 'reasonable'.

169 The Commission submits that these are new pleas which go beyond the scope of the application and that they are therefore inadmissible. They are also unfounded.

170 As regards the Commission's objection of inadmissibility, which is based on the fourth paragraph of Article 40 of the Statute of the Court of Justice of the European Union, which, pursuant to Article 53 thereof and Article 166 of the Rules of Procedure, applies to the General Court, it must be recalled that the Courts of the European Union are entitled to assess, according to the circumstances of each case, whether the proper administration of justice justifies the dismissal of a plea in law on its merits without first ruling on its admissibility (Case T-171/02 *Regione autonoma della Sardegna* v *Commission* [2005] ECR II-2123, paragraph 155).

171 In the circumstances of the present case, the General Court considers that, in the interests of procedural economy, the merits of the complaints which Telefónica de España and Telefónica Móviles España put forward in the context of the second plea should be examined at the outset, without first ruling on their admissibility, since those complaints are, in any event, wholly unfounded, for the reasons set out below.

172 The complaints which Telefónica de España and Telefónica Móviles España make concern the reasons set out in recitals 67 to 73 to the contested decision, in which the Commission assessed whether there was a risk of overcompensation and concluded that there was no indication that the estimated annual compensation for RTVE's public service obligation would exceed the reasonably likely costs of that service or would ultimately exceed the net costs of the public service. In recital 71, the Commission noted, in particular, the following:

'However, Spain demonstrated that the budgetary planning remains in line with RTVE's annual budgeted costs in previous years and that there is no reason to assume that any considerable cost savings could be made now or in the near future merely through the abolition of advertising. RTVE will continue to be required to attract a large audience, and the abolition of commercials will create a need for additional productions which will have to be financed. Compared to the figures of previous years (EUR 1 177 million in 2007, EUR 1 222 million in 2008 and EUR 1 146 million in 2009) and taking into account the additional cost of the productions (EUR 104 million) needed to replace the advertising air time [and] the remaining commercial income (estimated [at] only EUR 25 million), a ceiling of EUR 1 200 million for the budgetary cost planning seems a cautious and reasonable amount for the annual budgeted costs of the public service compensation. Furthermore, the principle of compensating the effective net costs of a public broadcaster necessarily entails protecting it from the variations in the revenues in the advertising market.'

173 Telefónica de España and Telefónica Móviles España allege, first, infringement of Article 106(2) TFEU and, secondly, a breach of the duty to state reasons.

– The complaint of infringement of Article 106(2) TFEU

174 Telefónica de España and Telefónica Móviles España argue that the Commission infringed Article 106(2) TFEU by authorising RTVE's funding scheme without ensuring that it did not entail a risk of overcompensation.

175 First of all, Telefónica de España and Telefónica Móviles España maintain that, in recital 71 to the contested decision, the Commission failed to conduct a sufficiently detailed review.

176 It must be recalled in this connection that, as was stated in paragraph 117 above, in order for State aid, within the meaning of Article 107 TFEU, to be declared compatible with the internal market on the basis of Article 106(2) TFEU, the operator entrusted with the service of general economic interest must not receive excessive compensation.

177 In the present case, Telefónica de España and Telefónica Móviles España do not call into question the Commission's finding that RTVE is entrusted with a service of general economic interest by an act of a public authority that clearly defines the general economic interest service obligations.

178 On the other hand, Telefónica de España and Telefónica Móviles España submit that the Commission's finding, set out in recital 73 to the contested decision, that there was no indication that the estimated annual compensation for RTVE's public service obligation would exceed the reasonably likely costs of that service or would ultimately exceed the net costs of the public service, is vitiated by error in that the Commission failed to give sufficient consideration to the risk of overcompensation.

179 In this connection it is important to note, first of all, that Telefónica de España and Telefónica Móviles España call into question only one of the review mechanisms provided for by RTVE's funding scheme, although the scheme establishes a whole series of review mechanisms designed to ensure that RTVE receives no more than the funds it needs to fulfil its remit.

180 Having said that, it is appropriate to point out, first, that the economic dimension of RTVE's activity is determined by reference to the public service obligations that have been conferred on it. Accordingly, Article 3(2) of Law No 8/2009 makes clear that RTVE's activity is governed by a framework mandate, approved by the legislature, of nine years' duration (see Article 4(1) of Law No 17/2006) and by government-approved programming agreements of three years' duration which implement the framework mandate (see Article 4(2) of Law No 17/2006). The framework mandate and programming agreements must contain information about the economic dimension of RTVE's activity and the limits on its annual growth, that economic dimension being determined in light of the public service obligations conferred on the broadcaster.

181 Next, it is appropriate to point out that the sources of funding for RTVE are conceived in such a way as to prevent overcompensation. As was explained in paragraphs 6 to 9 above, RTVE is funded from a number of sources, which are listed in Article 2(1) of Law No 8/2009. The principal sources are the revenue from the three fiscal measures introduced or modified by Articles 4 to 6 of Law No 8/2009 and the annual compensation drawn from the general budget of the Spanish State, which is referred to in Article 2(1)(a) of that law. Establishing a sum of annual compensation thus makes it possible to adjust the projected amount of revenue available to RTVE in any given financial year. Article 33(1) of Law No 17/2006 provides that the annual compensation is to be determined at such a level that the combined total of that compensation and all the other revenue available to RTVE does not exceed the costs of the public service obligations which it must discharge during the financial year in question.

182 Moreover, Article 33(2) of Law No 17/2006, as amended by Law No 8/2009, provides that, if, at year-end, it transpires that the revenue that RTVE has received exceeds the net costs which it has incurred in fulfilling its public service broadcasting obligation during the financial year, any surplus that is not paid into the reserve fund is to be deducted from the sums allocated from the general budget of the Spanish State in the following year.

183 Lastly, RTVE's funding scheme also provides for *ex post* review mechanisms. As the Commission stated in recital 72 to the contested decision, RTVE's funding scheme entails, first of all, budgetary control mechanisms consisting in internal audit, review by the Spanish government audit office and external

auditing by a private audit firm, secondly, supervision of the performance of RTVE's public service mandate and of its annual accounts by the Spanish Parliament and the Spanish audiovisual authority and, thirdly, review by the Spanish Court of Auditors.

184 Admittedly, the review mechanisms mentioned in paragraphs 180 to 183 above remain somewhat abstract. However, it must be borne in mind that, in the contested decision, the Commission was assessing the compatibility of an aid scheme. It was therefore entitled to restrict itself to checking whether adequate review mechanisms were in place to ensure that the total amount of aid received by RTVE in any given financial year in accordance with that aid scheme does not exceed the net costs of fulfilling the public service broadcasting remit conferred on it.

185 It must be observed that Telefónica de España and Telefónica Móviles España have not put forward any arguments specifically to call into question the effectiveness of the review mechanisms mentioned in paragraphs 180 to 183 above. In so far as they assert that the Commission was not entitled to refer, in the contested decision, to earlier decisions on the funding of RTVE, it must be recalled that it was required to examine the compatibility of the elements of RTVE's existing funding scheme only to the extent that they were altered by Law No 8/2009. Therefore, since the effectiveness of the review mechanisms established under RTVE's previous funding scheme were not called into question by the alterations brought about by Law No 8/2009, there was nothing to prevent the Commission from referring to its previous analysis of those mechanisms.

186 Turning now, more specifically, to the complaints which Telefónica de España and Telefónica Móviles España make regarding the findings which the Commission set out in recital 71 to the contested decision, it is appropriate first to consider the function of the sum of EUR 1 200 million provided for in Article 3(2) of Law No 8/2009 and then to assess whether the Commission's review was insufficient.

187 In so far as concerns the function of the sum of EUR 1 200 million, it must be borne in mind, first of all, that the Commission did not approve a funding scheme under which, in any given financial year, RTVE would have a budget of that amount at its disposal. As was outlined in paragraphs 180 to 183, Law No 8/2009 establishes mechanisms to ensure that the aid for RTVE actually corresponds to the net costs of performing its public service obligations. Accordingly, Article 3(2) of Law No 8/2009 lays down an absolute limit of EUR 1 200 million for RTVE's budget, that is to say, a limit which may not be exceeded even though its budget might be larger if the only relevant criterion were the costs of performing its public service obligations. Given that limit, RTVE's budget may not exceed the maximum amount of EUR 1 200 million, yet it may be smaller, in the event that the costs of fulfilling its public service remit in any given year are lower.

188 It follows, first of all, that the complaint made by Telefónica de España and Telefónica Móviles España that the cost to RTVE of performing its public service obligations might possibly be lower than EUR 1 200 million must be rejected. Indeed, the review mechanisms mentioned in paragraphs 180 to 183 above guarantee that, if that is the case, the amount of aid provided in that financial year will be limited to the net costs incurred in performing the public service broadcasting obligations.

189 Next, as regards Telefónica de España and Telefónica Móviles España's complaints regarding the inadequacy of the Commission's review of the limit of EUR 1 200 million, it must be borne in mind that the Member States enjoy a broad discretion in determining the amount of compensation to be paid for the provision of a public broadcasting service and that, as regards the proportionality of the compensation for a public service broadcasting obligation, the scope of the Commission's review is limited and that of the General Court's review of a Commission decision is even more limited (see paragraphs 126 to 128 above). The review of the General Court is thus restricted to considering whether the Commission has made a manifest error of assessment.

190 In the present case, none of the arguments put forward by Telefónica de España and Telefónica Móviles España is capable of showing that the considerations set out in recital 71 to the contested decision, according to which the ceiling of EUR 1 200 million seemed reasonable, are vitiated by a manifest error of assessment.

191 First of all, as the Commission stated in recital 71 to the contested decision, the sum of EUR 1 200 million corresponded to the average budget that was available to RTVE under the dual funding scheme.

192 Secondly, it is clear from recital 71 to the contested decision that the Commission took into account supplemental costs of EUR 104 million incurred in order to fill air time previously reserved for advertising and costs generated by the performance of additional public service obligations in the matter of programming imposed on RTVE by Law No 8/2009 and that it also took the view that there was no reason to assume that the abolition of advertising would entail any considerable reduction in RTVE's actual costs.

193 Contrary to the assertion made by Telefónica de España and Telefónica Móviles España, those considerations were not manifestly erroneous. Indeed, it could be taken for granted that the costs of performing RTVE's public service mandate would be substantially lower than the costs which it had incurred under the scheme established by Law No 17/2006. Admittedly, in recital 59 to the contested decision, the Commission observed that withdrawing RTVE from the advertising market might contribute to strengthening the public service remit by making programming less dependent on commercial considerations and fluctuations in commercial revenues. Nevertheless, contrary to Telefónica de España and Telefónica Móviles España's submission, the mere fact that RTVE has become an operator no longer subject to the commercial pressures associated with a presence in the advertising market does not justify the inference that it would be able to offer a different range of programmes which would enable it to operate at substantially lower costs. Indeed, Article 106(2) TFEU does not preclude Member States from defining a public broadcasting service remit broadly, enabling public service broadcasters to provide balanced and varied programming, while preserving a certain level of audience (*SIC* v *Commission* paragraph 130 above, paragraph 201).

194 Thirdly, contrary to Telefónica de España and Telefónica Móviles España's assertion, the Commission did not make a manifest error of assessment by not examining further whether the shift to a quasi-public funding scheme and the alteration of the public service obligations might have an effect on the costs incurred by RTVE. Indeed, given that the sum of EUR 1 200 million provided for in Article 3(2) of Law No 8/2009 is merely an upper limit for RTVE's budget and that the mechanisms described in paragraphs 180 to 183 above guarantee that the amount of aid provided to RTVE does not exceed the net costs of its public service obligations, the Commission was under no obligation to carry out a more detailed examination.

195 Fourthly, in so far as Telefónica de España and Telefónica Móviles España argue that the Commission should have responded to the observations of certain national authorities, it must be observed that, in recital 69 to the contested decision, the Commission itself mentioned its concerns regarding the proportionality of the measure, but concluded, after consideration, that there was no risk of overcompensation. In any event, the fact that the Commission might not examine in detail all the critical observations submitted by national administrative authorities regarding a draft law is not in itself capable of demonstrating any manifest error of assessment on its part, especially where the field in question is one in which the Member States enjoy a broad discretion and the scope of the Commission's review is limited.

196 Therefore, Telefónica de España and Telefónica Móviles España have failed to show that the Commission's finding, set out in recital 71 to the contested decision, that the ceiling of EUR 1 200 million seemed reasonable is vitiated by a manifest error of assessment.

197 In light of the foregoing considerations, the complaint alleging a lack of a sufficiently detailed *ex ante* review must be rejected.

– The complaint alleging a breach of the duty to state reasons

198 Telefónica de España and Telefónica Móviles España argue that the Commission breached its duty to state reasons under Article 296 TFEU. It failed to give sufficient reasons for its conclusion that there was no risk of overcompensation.

199 It is important to bear in mind in this context that the statement of reasons required by Article 296 TFEU must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent European Union Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU 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 (see Joined Cases T-81/07 to T-83/07 *KG Holding and Others* v *Commission* [2009] ECR II-2411, paragraphs 61 and 62 and the case-law cited).

200 In the present case, the Commission's statement of reasons was adequate.

201 First of all, contrary to the suggestion which Telefónica de España and Telefónica Móviles España make, the reasoning in the contested decision on which the Commission based its conclusion that there was no risk of overcompensation is not restricted to recital 71 to the decision. Indeed, in recitals 67 to 73 to the decision, the Commission also referred to the review mechanisms mentioned in paragraphs 180 to 183 above. It must also be borne in mind in this context that the Commission also referred to those mechanisms in recitals 14, 16 and 17 to the decision.

202 Next, in so far as concerns the complaint made by Telefónica de España and Telefónica Móviles España regarding the abstract nature of some of those considerations, suffice it to recall that it is clear from the contested decision that the Commission restricted itself to approving an aid scheme that enabled RTVE to benefit from aid corresponding to the net costs of performing its public service obligations and that it did not express its position on the compatibility of aid in the sum of EUR 1 200 million.

203 Moreover, in so far as Telefónica de España and Telefónica Móviles España argue that the Commission should have responded to the observations of certain national authorities, it must be observed that the Commission's statement of reasons for a decision is sufficient if the decision discloses in a clear and unequivocal fashion the reasoning which it has followed, in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Court to exercise its power of review and that it is not necessary for the reasoning to go into all the relevant facts and points of law. Having set out, in recitals 67 to 76 to the contested decision, the reasons for which the measure was proportionate, the Commission was not required to respond specifically to all the critical observations submitted by the national administrative authorities concerning the draft law, especially in a field in which the Member States enjoy a broad discretion and the scope of the Commission's review is, therefore, limited.

204 This complaint must therefore also be rejected.

205 Accordingly, the Court must also reject the other complaints which Telefónica de España and Telefónica Móviles España put forward in the context of the second plea.

206 It follows that the plea alleging infringement of Article 106(2) TFEU and the complaints which Telefónica de España and Telefónica Móviles España put forward in the context of the second plea must be rejected in their entirety.

The other pleas put forward by Telefónica de España and Telefónica Móviles España

207 Telefónica de España and Telefónica Móviles España put forward two additional pleas.

208 First, Telefónica de España and Telefónica Móviles España argue that the Commission infringed the procedural rights which they are guaranteed by Article 108(2) TFEU by stating, in decision to initiate the formal investigation procedure, that the three fiscal measures introduced or rearranged by Law No 8/2009 were severable from the existing funding scheme, whereas that point was, in fact, debateable.

209 Secondly, Telefónica de España and Telefónica Móviles España argue that the Commission infringed Article 108 TFEU by stating, in recital 53 to the contested decision, that the three fiscal measures introduced or amended by Law No 8/2009 were severable from RTVE's existing funding scheme.

210 The Commission, on the other hand, submits that these pleas must be dismissed as inadmissible and, in any event, unfounded.

211 Suffice it to recall in this connection that, pursuant to the fourth paragraph of Article 40 of the Statute of the Court of Justice, which, pursuant to Article 53 thereof, applies to the General Court, an application to intervene is to be limited to supporting the form of order sought by one of the parties. Under Article 116(3) of the Rules of Procedure, the intervener must accept the case as it finds it at the time of its intervention. According to the case-law, those provisions do not preclude an intervener from using arguments different from those used by the party it is supporting, provided that they do not alter the framework of the dispute and that the intervention is still intended to support the form of order sought by that party (Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* [1961] ECR 1 at 17 and 18).

212 In the present case, the subject-matter of the dispute as it is constituted between the applicant and the Commission is the annulment of the contested decision. The framework of the dispute is defined by the three pleas in law put forward by the applicant, alleging, first, misapplication of the concept of aid in so far as concerns the dissociable nature of the three fiscal measures introduced or modified by Law No 8/2009, secondly, infringement of Articles 49 TFEU and 64 TFEU and, thirdly, infringement of Article 106(2) TFEU.

213 However, neither the application nor the defence contains arguments concerning a possible infringement of the procedural rights guaranteed by Article 108 TFEU and Article 1(c) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1). That allegation of infringement was raised for the first time in the statement of intervention.

214 It follows that the two additional pleas put forward by Telefónica de España and Telefónica Móviles España are unconnected with the subject-matter of the present dispute as it was defined by the main parties and they therefore alter the framework of the dispute. Those pleas must therefore be rejected as inadmissible.

215 None of the arguments which Telefónica de España and Telefónica Móviles España put forward is capable of calling that conclusion into question.

216 First, inasmuch as the interveners refer to paragraph 36 of the judgment of the Court of Justice of 19 November 1998 in *United Kingdom* v *Council* (Case C-150/94, ECR I-7235), it must be observed that, in that judgment, the Court held that the argument put forward by the intervener, the admissibility of which had been called into question in that case, related to a plea put forward by one of the main parties and supported the form of order sought by that party. As was shown in paragraphs 212 to 214 above, that is not the situation in the present case.

217 Secondly, Telefónica de España and Telefónica Móviles España rely on paragraph 55 of the judgment of the Court of Justice of 8 July 2010 in *Commission* v *Italy* (Case C-334/08, ECR I-6869). Admittedly, in that judgement, the Court held that a plea which had not been put forward by the main party supported by that intervener, but by the intervener alone, was admissible. However, that plea related to a ground of defence and it was raised in an action for failure to fulfil obligations under Article 260 TFEU. In infringement proceedings of that kind, the Court must make all the findings necessary in order to reach a finding that the Member State in question has failed to fulfil its obligations. A ground of defence which relates to a point of fact or law which the Commission is necessarily required to examine in the context of its assessment is not capable of altering the framework of the dispute. By contrast, in the present case, Telefónica de España and Telefónica Móviles España are intervening in an action for annulment, the scope of which is specifically defined by the pleas put forward by the applicant.

218 The Court must therefore dismiss the two additional pleas put forward by Telefónica de España and Telefónica Móviles España as inadmissible.

219 In the light of all the foregoing considerations, the action must be dismissed.

Costs

220 Under Article 87(2) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings, and under the first subparagraph of Article 87(4) of the Rules of Procedure, Member States which have intervened in the proceedings are to bear their own costs.

221 As regards the main proceedings, the applicant has been wholly unsuccessful and the Commission and RTVE have applied for costs to be awarded against the applicant. The applicant must, therefore, be ordered to bear its own costs and to pay the costs of RTVE and the Commission, with the exception of the costs incurred by the Commission as a result of the intervention. Telefónica de España and Telefónica Móviles España have been unsuccessful and they must be ordered to bear their own costs and, jointly, to pay the costs incurred by the Commission as a result of their invention, as applied for by the Commission. The Kingdom of Spain must bear its own costs.

222 As regards the application for interim measures, the applicant was wholly unsuccessful. It must therefore be ordered to bear its own costs and to pay the costs of RTVE and the Commission, since they have applied for costs to be awarded against it. The Kingdom of Spain must bear its own costs.

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Distribuidora de Televisión Digital, SA to bear its own costs, including the costs of the application for interim measures, and to pay the costs of Corporación de Radio y Televisión Española, SA (RTVE), including the costs of the application for interim measures, and those of the European Commission, including the costs of the application for interim measures, with the exception of the costs incurred by the Commission as a result of the intervention of Telefónica de España, SA and Telefónica Móviles España, SA;**

3. **Orders Telefónica de España and Telefónica Móviles España to bear their own costs and, jointly, to pay the costs incurred by the Commission as a result of their intervention;**

4. **Orders the Kingdom of Spain to bear its own costs, including the costs of the application for interim measures.**

Czúcz Labucka Gratsias

Delivered in open court in Luxembourg on 11 July 2014.

[Signatures]

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