Documentation

LITIGATING EUROPEAN UNION LAW

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Table of contents

Court of Justice of the EU

Composition, organisation and competences

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Part I. Court of Justice

CJEU - Introduction

- Est.: 1952
- Mission: ensure that "the law is observed" "in the interpretation and application" of the Treaties
- CJUE:
  - reviews the legality of the acts of EU institutions
  - ensures that the Member States comply with obligations under the Treaties
  - interprets EU law at the request of the national courts and tribunals

Court of Justice - Introduction

- In cooperation with the courts and tribunals of the Member States, it ensures the uniform application and interpretation of EU law
- Seat: Luxembourg
- CJEU consists of 2 courts:
  - Court of Justice
  - General Court (created in 1988).
  - Civil Service Tribunal, established in 2004, ceased to operate on 1 September 2016 after its jurisdiction was transferred to the General Court in the context of the reform of EU's judicial structure

Court of Justice - Introduction

- As each Member State has its own language and specific legal system, CJEU is a multilingual institution
- Its language arrangements have no equivalent in any other court in the world, since each of EU's official languages can be the language of a case
- It is required to observe the principle of multilingualism in full, because:
  - need to communicate with the parties in the language of the proceedings
  - to ensure that its case-law is disseminated throughout the Member States

Court of Justice - Introduction

- 1 December 2009: Lisbon Treaty
- Community competences => Union (EU legal personality)
- From its establishment: 28 000 judgments 3 (2) courts combined

Court of Justice - Composition

- Members of the Court are…
  - 28 Judges: CJ has 1 Judge per Member State - all the national legal systems are represented (this is different for the General Court)
  - 11 Advocates General
  - They are appointed by common accord of the governments of the MSs after consultation of a panel responsible for giving an opinion on prospective candidates' suitability to perform the duties concerned (255 Committee) (Lisbon)

Court of Justice - Composition

- Term of 6 years, renewable (different for AGs)
  - Individuals whose independence is beyond doubt and who possess the qualifications required for appointment, in their respective countries, to the highest judicial offices, or who are of recognised competence
  - Judges of the Court elect from amongst themselves a President and a V-P for a renewable term of 3 years
  - President directs the work of the Court and presides at hearings and deliberations of the full Court or the Grand Chamber

Court of Justice - Composition

- Vice-President assists the President in the exercise of his duties and takes his place when necessary
- Advocates General assist the Court. They are responsible for presenting, with complete impartiality and independence, an 'opinion' in the cases assigned to them
- Permanent: FR, DE, IT, PL, ES and EN
- Registrar is the institution's secretary general and manages its departments

Court of Justice - Composition

- CJ may sit as a full court, in a Grand Chamber (15) or in Chambers of 5 (5 Ch. in total) or 3 judges (4)
- Full court:
  - In the particular cases prescribed by the Statute of the Court (including proceedings to dismiss the European Ombudsman or a Member of the Commission who has failed to fulfil his or her obligations) and where the Court considers that a case is of exceptional importance
- Grand Chamber: when a Member State or an institution which is a party to the proceedings so requests, and in particularly complex or important cases

Court of Justice - Composition

- CJ must always consist of an uneven number of Judges (now 28 Judges?)
- Presidents of the Chambers of 5 Judges are elected for 3 years, and those of the Chambers of 3 Judges for 1 year
- Current President: Koen Lenaerts (BE)
- Vice-President: Antonio Tizzano (IT)
- 1st Advocate General: Melchior Wathelet (BE)

Court of Justice - Composition

- Working language = FR (but AGs may 'in principle' draft in their own language)
- Deliberations are secret

Part II. General Court

General Court - Composition

- Is made up of at least 1 judge from each Member State (44 judges in office as at 19 September 2016) (more on reform later…)
- Appointment and 255 Committee…
- Term of office is 6 years, renewable
- Judges appoint their President and V-P (for 3 years) from amongst themselves (Registrar for 6 years)
- No permanent AGs, but may exceptionally be carried out by a judge

General Court - Composition

- Current President: Marc Jaeger (LU)
- Vice-President: Marc van der Woude (NL)

General Court - Composition

- Cases are heard by Chambers of 3 or 5 Judges or, in some cases, as a single Judge
- GC may also sit as a Grand Chamber (15 Judges) when this is justified by the legal complexity or importance of the case
- Presidents of Chambers of 5 elected for 3 years
- GC has its own Registry, but uses the administrative and linguistic services of the institution for its other requirements

Part III. Reform of the General Court

General Court - Reform

- On 16.12. 2015, the EU legislature adopted a regulation reforming the judicial structure of the CJUE
- Purpose : to respond to the immediate needs of the GC - which had 28 judges in 2015 - and to enhance, on a lasting basis, the efficiency of the European judicial system as a whole

General Court - Reform

- **3 stages:**
  - Initial increase of 12 judges at GC achieved in part in April 2016
  - In September 2016 (at the next partial renewal of the membership of the GC), the number of judges was increased by 7 when the Civil Service Tribunal was incorporated within the GC (CJUE now composed of only 2 courts)
  - In the autumn of 2019 (the following renewal of the membership of the GC), the number of judges will finally be increased by 9, bringing the total number of judges to 56; the GC will then have 2 judges per Member State

General Court - Reform

- For now 44 judges (3 still in the process of being appointed)
- By virtue of the number of judges being doubled in a 3-stage process extending until 2019, GC will be in a position to cope with the increase in litigation and to fulfil its task in the interests of EU litigants
- … while meeting the objectives of quality, efficiency and rapidity of justice
- The reform was accompanied by the drafting of new Rules of Procedure of the GC (entry into force on 1.7. 2015) which will strengthen its capacity to deal with cases within a reasonable period and in compliance with the requirements of a fair hearing

General Court - Reform / New structure

- From September 2016: 9 chambers of 5 judges
- … each Chamber being able to sit in 2 formations of 3 Judges presided over by the President of the Chamber of 5 Judges

- Being sufficiently streamlined, it will preserve the coherence of the system through the retention of the 3-Judge formation as the ordinary formation of the Court
- Will facilitate the referral of cases to 5-Judge formations
- Will facilitate the replacement from within the same Chamber of any Judge who is prevented from acting
- Will give the Presidents of Chambers an enhanced role in respect of the coordination and consistency of the case-law

General Court - Reform

- Finally, GC shall deal with all civil service cases transferred from the Civil Service Tribunal to the GC as it found them on 1 September 2016
- … they will be subject to a right of appeal to CJ

Part IV. A few words on the role of the CJEU within the EU judicial system

CJEU's role…

- Sufficient legal remedies/procedures exist before Union courts and the national courts to enforce EU law rights and to ensure judicial review of Union acts
- There exist direct and indirect paths by which to enforce rights based on EU law and to review the legality of Union acts
- National courts are 'normal' or 'ordinary' Union courts

CJEU's role…

- 'While it is true that the Court has no jurisdiction to rule on direct actions between individuals in the field of patents, since that jurisdiction is held by the courts of the Member States, nonetheless the Member States cannot confer the jurisdiction to resolve such disputes on a court created by an international agreement which would deprive those courts of their task, as 'ordinary' courts within the European Union legal order, to implement European Union law and, thereby, of the power provided for in Article 267 TFEU, or, as the case may be, the obligation, to refer questions for a preliminary ruling in the field concerned' (Opinion of CJ 1/09 'Unified Patent Litigation System', para 80)

CJEU's role…

- By contrast, the organic Union courts at EU level (CJ and GC) are bound by the principle of conferral whereby they exercise only the jurisdiction conferred upon them under the Treaties
- Union courts do not have inherent jurisdiction just because matters of EU law are involved in a given case
- Everything falling outside of what the Treaties confer upon the Union courts (CJEU) falls within the residual competences of the national courts:
  - Cases between natural and legal persons
  - Cases between natural and legal persons and national authorities
- Private party may bring a case before CJEU only against a Union defendant (institution, office etc.)
- Hence the importance of the preliminary ruling procedure

CJEU's role...

- As Lenaerts et al. (EU Procedural Law) aptly put it, Union law acts as a:
- 1) sword for safeguarding the rights deriving from the law and hence this implicates certain types of actions and procedures which ensure that the Member States comply with their obligations under the Treaties
- 2) shield: Union judicature secures the enforcement of written and unwritten superior rules of Union law and affords protection against any act or failure to act of institutions and other bodies of the Union in breach of those rules

Thank you for your attention.

The CJEU - Judicial remedies

Takis Tridimas

Article 19 TEU

1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

2. The Court of Justice shall consist of one judge from each Member State. It shall be assisted by Advocates-General.

The General Court shall include at least one judge per Member State… (47 judges as from 1.9.16 two per MS as from 1.9.19)

Jurisdiction

- Direct actions
- References for a preliminary ruling
- Opinions

Direct actions

- Enforcement proceedings against Member States: Articles 258-9 TFEU
- Actions for judicial review of Union acts: Article 263 TFEU
- Actions for failure to act from the institutions: Article 265 TFEU
- Actions based on the non-contractual liability of the Union: Article 340(2) TFEU

- Actions based on the contractual liability of the Union (arbitration clause): Article 272 TFEU
- Staff cases: Article 270 TFEU
- Unlimited jurisdiction in relation to penalties: Article 261 TFEU
- Jurisdiction to hear in the first instance direct actions brought by natural or legal persons has been gradually transferred to the General Court. The judgments of the General Court are subject to appeal on points of law to the Court of Justice.

Jurisdiction of the General Court

- Actions brought by natural or legal persons against EU measures, e.g. an action brought by a company against a competition decision of the Commission;
- Actions brought by the Member States against the Commission;
- actions brought by the Member States against the Council relating to acts adopted in the field of State aid, trade protection measures (dumping) and acts by which it exercises implementing powers;
- Actions in damages against the EU;

- Actions based on the contractual liability of the EU;
- Actions relating to intellectual property brought against the Office for Harmonisation in the Internal Market (Trade Marks and Designs) and against the Community Plant Variety Office;

- The decisions of the General Court may, within two months, be subject to an appeal before the Court of Justice, limited to points of law.
- ECJ Statute and Rules of Procedure: http://curia.europa.eu/jcms/jcms/j_6/en/

- **References for preliminary rulings**: Article 267 TFEU
- **Opinions** on envisaged international agreements: Article 218 TFEU
- The Court has exclusive jurisdiction over disputes concerning the interpretation or application of the Treaty: Article 344 TFEU; C-459/03 *Commission v Ireland (Mox plant case)* [2006] ECR I-4635

Actions for judicial review of EU acts

- An act is voidable not void
- Action for annulment (Article 263 TFEU)
- Action for failure to act (Article 265 TFEU)
- Only the CJEU may declare an EU act invalid; National courts may not do so: 314/85 *Foto-Frost* [1987] ECR 4199
- Direct – Indirect challenge to validity
- A *direct challenge* occurs where the purpose of the proceedings is to annul the act in question.

- An *indirect or collateral* challenge is a challenge to the validity of an EU act made in proceedings initiated for a different purpose
- Example: the EU adopts a regulation imposing an environmental levy.
- The regulation is implemented by the national ministries for the environment which calculate the precise levy to be paid by each company. Company X in Germany can bring proceedings before a German court against the validity of the national decision imposing the levy arguing that the EU regulation on which it is based is unlawful. The national court refers the question of validity to the ECJ (Art 267 TFEU)

- If, in the above example, the regulation is implemented not by the national authorities but by the Commission, corporation X could bring proceedings against the Commission's decision before the CJEU arguing that the regulation was invalid (Article 277 TFEU)
- Indirect challenge is helpful where a person does not have standing to challenge a law directly. See below: Article 263(4) TFEU

Action for annulment (Article 263 TFEU)

- Any act which is intended to have binding legal effects may be challenged
- Who can challenge? Standing (locus standi)
- Privileged applicants (263(2): Council, EP, Commission, Member States)
- Prerogative-based applicants (263(3): CA, ECB, CR)
- Non privileged applicants (263(4))

Individuals may challenge (Article 263(4))

- Acts addressed to them;

  (e.g. Google may contest a Commission finding that it has violated EU anti trust law and a fine imposed on it for the violation)
- Acts which are of direct and individual concern to them;
- Regulatory acts which are of direct concern to them and do not entail any implementing measures. In relation to those acts, NO need to prove individual concern.

Acts which are of direct and individual concern

- Individual concern (Case 25/62 *Plaumann* [1963] ECR 95):
- Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them **by reason of certain attributes peculiar to them or by reason of circumstances in which they are differentiated from all other persons** and by virtue of these factors distinguishes them individually just as in the case of the person addressed.

- The applicant must be a member of a closed group i.e. one whose members may not change after the adoption of the contested act: C-309/89 *Codorniu SA* [1994] ECR I-1853
- Direct concern:
- An act is of direct concern to a person when the change to the person's legal position is the direct result of the act, i.e. where it it leaves no discretion to the address as to how to implement it 11/82 *Piraiki-Patraiki v Commission* [1985] ECR 207

- C-403/96 P *Glencore Grain Ltd v Commission* [1998] ECR I-2405
- Harsh effects of narrow interpretation of individual concern:
- C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677 and Opinion of Advocate General Jacobs delivered on 21 March 2002
- T-177/01 *Jégo-Quéré v Commission* [2002] ECR II-02365, reversed on appeal C-263/02 P *Commission v Jégo Quéré* [2004] ECR I-3425

- Regulatory Act: a non-legislative act of general application (Case C-583/11 P *Inuit,* 3.10.2013), e.g. a Commission regulation implementing a legislative act
- A legislative act is one which has been adopted by the legislative procedure i.e. the Council and the Parliament (Article 289 TFEU)
- A regulatory act can be challenged if (a) it is of direct concern to the applicant and (b) entails no implementing measures: C-274/12 *Telefonica* EU:C:2013:852; C-456/13P *T&L Sugars, EU:C:2015:284*

Indirect challenge via 267 TFEU

- A Union act may also be challenged indirectly in proceedings initiated before a national court through the preliminary reference procedure, Article 267 TFEU.
- A person however may not challenge via Article 267 TFEU a Union act where it is beyond doubt that he has *locus standi* to challenge it via Article 263 TFEU: C-188/92 *TWD v Germany* [1994] ECR I-833

- C-550/09 *E & F* , [2010] ECR I-06213
- Joined cases C-346/03 and C-529/03 *Atzeni* [2006] ECR I-1875

- C-491/01 *The Queen v Secretary of State for health ex parte British American Tobacco Ltd* [2002] ECR I-11453

Article 267 TFEU: Preliminary References

'The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.'

Purpose of the preliminary reference procedure

- It facilitates the uniform interpretation of EU law throughout the EU
- It provides the possibility of indirect challenge to the validity of EU acts

Only the CJEU may declare an EU act invalid; National courts may not do so: 314/85 *Foto-Frost* [1987] ECR 4199

- Note difference between Article 267(2) (discretion to refer) and Article 267(3) (obligation to refer)
- A national court of last instance is under no obligation to refer when the issue is *acte clair* (283/81 *CILFIT v Ministry of Health* [1982] ECR 3415) or when the ECJ has already ruled on the question of interpretation referred by the national court

- When the correct application of Community law is so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. In this context account should be taken of the peculiar features of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community. Every provision of Community law must be placed in its context and interpreted in the light of provisions of Community law as a whole, regard being had to the objectives and its state of evolution at the date on which the provision in question is to be applied.

- What remedies exist if a court covered by Article 267(3) TFEU fails to meet its obligation to make a reference?
- The Commission may bring enforcement proceedings against the Member State: 9/75 *Meyer-Burckhart v Commission* [1975] ECR 1171
- It may also render the State liable in damages:

  C-224/01 *Köbler v Austria* [2003] I-10239;
  Case C-160/14 *Ferreira da Silva*

The importance of Article 267 and the judicial dialogue

- Express and 'silent' dialogue
- (*OMT judgment*, German FCC; *HS2* UK SC)
- Is the relationship between the ECJ and the national courts cooperative or hierarchical?
- Features of the dialogue
- Democracy and the dispersal of judicial power
- The 'centralised constitutional model'
- See *Tridimas, The ECJ and the National Courts: Dialogue, Cooperation, and Instability*

Grounds of review

- lack of competence
- breach of fundamental rights
- breach of general principles of law
- breach of essential procedural requirements:
- requirement to give reasons (Article 253): 24/62 *Germany v Commission* [1963] ECR 63;
- requirement to grant a hearing (*audi alteram partem*): 17/74 *Transocean Marine Paint v Commission* [1974] ECR 1063;
- requirement to consult: 138/79 *Roquette v Council* [1980] ECR 3333

Fundamental Rights

- 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125
- Article 6 TEU

Article 6 TEU

- The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights … which shall have the same legal value as the Treaties. (Art 6(1))
- The Union shall accede to the ECHR (Art 6(2))
- 'Fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law' (Art 6(3))

General Principles of Law

- Extrapolated from the national constitutional traditions but the ECJ is not looking for a common denominator
- Equality, proportionality, fundamental rights, protection of legitimate expectations, rights of defence
- Case C-144/04 *Mangold* [2005] ECR I-9981
- Joined Cases C-402/05 P & C-415/05 P *Kadi I* [2008] ECR I-6351
- Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Kadi II*

Fundamental Rights v Free movement

- C-159/90 *Society for the Protection of Unborn Children Ireland Ltd v Grogan*[1991] ECR I-4685
- C-112/00 *Schmidberger* [2003] ECR I-5659
- C-36/02 *Omega* [2004] ECR I-9609 (cf *Brown, Governor of California v Entertainment Merchants Association,* US SC 27 June 2011.

The Charter

- What is protected?
- Scope of application
- Relationship with general body of EU law and other sources of fundamental rights
- Impact

Examples

- Right to family life: Article 7
- Protection of personal data: Article 8
- Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd v Minister for Communications*, judgment of 8 April 2014
- Case C-131/12 *Google Spain v AEPD*, judgment of 13 May 2014

Scope of application

- Who is bound by the Charter? Article 51(1)
- EU institutions bodies and agencies
- Member States when:
- they implement EU law: C-617/10 *Fransson*, judgment of 26 February 2013;
- they act within the scope of EU law, e.g. invoke a derogation: C-260/89 *ERT* [1991] ECR I-2925
- Case C-650/13 *Delvigne* EU:C:2015:648; *Dano*

- In determining whether a national measure implements EU law, the Court will take into account, among others, the following factors: whether the measure is intended to implement a provision of EU law; the nature of that measure; whether it pursues objectives other than those covered by EU law even if it is capable of indirectly affecting EU law; and whether there are specific rules of EU law on the matter or capable of affecting it (C-206/13 *Siragusa*, judgment of 6 March 2014)

Individuals?

- *Mangold*
- *Benkharbouche* [2015] EWCA Civ 33

The Charter in context

- Articles 51-54 (Horizontal provisions)
- Limitations (Art 52(1))
- Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

- Relationship with EU Treaties (Art 52(2)): Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.
- Relationship with ECHR (Art 52(3)): In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

- Level of protection (Art 53): Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

- Case C-399/11 *Melloni v Ministerio Fiscal*, judgment of 26 February 2013
- Cf US *Knapp – Patane* litigation

ECJ ECHR

- *Matthews v United Kingdom*, ECHR, 18 February 1999
- *Bosphorus v Ireland*, ECHR, 30 June 2005

EU Accession to the ECHR

- Opinion 2/13

Action in damages

- Article 340(2) TFEU:

In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties

- The action for damages is an autonomous, form of action. Thus, in principle, the inadmissibility of a claim for annulment cannot entail the inadmissibility for a claim for damages: Cases 5,7 & 13-24/66 *Kampffmeyer v Commission* [1967] ECR 245
- But a party may not by means of an action for damages circumvent the inadmissibility of an application for annulment which concerns the same instance of illegality and has the same financial end in view: Joined cases C-199 and C-200/94 P *Pevasa and Impesca v Commission* [1995] ECR I-3709

- For the EU to incur liability, the following conditions must be met:

1) the Defendant institution must have breached a rule of law intended for the protection of individuals;
2) the breach must be serious;
3) there must be damage; and
4) there must be a direct causal link between the breach of the obligation resting on the Defendant institution and the damage sustained by the injured parties.

- See Case C-352/98 P *Laboratoires Pharmaceutiques Bergaderm and Goupil v Commission* [2000] ECR I-5291,

- Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising Ltd*, EU:C:2016:701 and Joined Cases C-105/15 P to C-109/15 P *Mallis* EU:C:2016:702

- No liability for valid acts: Joined cases C-120/06 P and 121/06 P *FIAMM* [2008] ECR I-6513

Preliminary references: Practice and procedure

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Preliminary references

I. Legal framework and relevance

II. Conditions

III. Consequences of the preliminary judgment

IV. Practical and procedural issues

I. Legal basis (1)

- Article 267 TFEU
- Juridical cooperation: Article 35 EU Treaty (old) repealed, with exceptions (Protocol 36; Article 276 TFEU): "*an instrument of cooperation between the ECJ and the national courts*" (cases C-197/89, *Dzodzi*, C-314/96, *Djabali*, C-458/06, *Skatteverket*)
- CFSP: Exception in Article 275 TFEU. However, Article 275, par. 2 TFEU
- Article 256 (3) TFEU
  - Preliminary procedures before the CFI made possible (but not yet implemented)

3

I. Legal basis (2)
Statistics

- First case 1961
  - Case 16/61, *De Geus en Uitdenbogerd / Robert Bosch a.o.*
- Ever since: extremely successful!
- Statistics on ECJ website
  - 9146 cases, up to and including 2015
  - 436 new cases in 2015
  - Champion of referrals: Germany, with 2216 cases, up to and including 2015
  - United Kingdom: 589 cases (1974-2015); 16 references in 2016

4

I. Legal basis (3)
Scope of reference

- The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
  - (a) the interpretation of this Treaty
  - (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union (which includes the ECB) of the Community and of the ECB

- Overall objective:

  "to avoid divergences in the interpretation of [EU law] which the national courts have to apply and … to ensure that, in all circumstances, that law has the same effect in all Member States"

  (case 166/73, *Rheinmühlen-Düsseldorf*; case C-458/06, *Skatteverket/Gourmet*)

I. Legal basis (4)
Option or obligation?

Optional Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers it necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Obligatory Where any such question is raised in a case pending before a national court of tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court shall bring the matter before the Court of Justice.

Urgency If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice shall act with the minimum of delay.

II. Conditions (1)

- Article 267 is based on cooperation: national courts & tribunals refer legal questions pertaining to the validity and/or interpretation of (mainly) EC law
- Sometimes referrals are obligatory
- So when can one apply for a preliminary reference? A number of cumulative conditions apply

II. Conditions (2)

1. Are there questions of law upon which ECJ has jurisdiction?
2. Are there questions on interpretation and validity?
3. Were the questions raised before a national court?
4. Is the decision of ECJ necessary for the national court to decide its case?

II. Conditions (3)
1. Questions of law (1)

a) the interpretation of this Treaty

b) the validity and interpretation of acts of the institutions, bodies, offices, or agencies of the Union

- Conventions between Member States
  - Formerly Article 293 EC (not in TFEU)
  - Provide for preliminary references to ECJ

- Recommendations and Opinions
  - Article 288 TFEU
  - Case C-322/88, *Grimaldi:* the Court has *"jurisdiction to give a preliminary ruling on the validity and interpretation of all acts of the institutions* [etc.] *without exception. It therefore has jurisdiction to rule on the interpretation of recommendations adopted on the basis of the Treaty."*

II. Conditions (4)
1. Questions of law (2)

- International agreements
  - EU and third countries

    "Any act concluded by the Council … is, as far as the [EU] is concerned, an act of one of the institutions … within the meaning of [Articles 267] …" (Case 12/86, *Demirel*)

- Mixed agreements
  - EU, Member States and third countries
  - Case C-53/96, Hermès/FHT: "*Since the Community is party to the TRIPS-Agreement and since that agreement applies to the Community Trade mark … it follows that the Court has, in any event, jurisdiction …*"
  - Case C-300/98, *Dior/Tuk*
  - Case C-392/98, *Assco/Layher*

- Agreements where EU is not a party
  - Cases 267-269/81, *SPI*: "*the substitution of the Community for the Member States … under the [GATT] …*"
  - Case C-469/93, *Chiquita*

II. Conditions (5)
1. Questions of law (3)

- General principles of law:
  - Article 263 TFEU
  - *"any rule of law"*
  - Case 316/86, *Hauptzollamt Hamburg-Jonas v Firma P. Krücken (general principles)*
- European Convention on Human Rights
  - Case C-260/89, *ERT, rec. 42*
- Charter of Fundamental Rights of the EU
  - Protocol no. 30 to the TFEU: The Court nor any court of Poland and the UK will have competence to find that Polish or UK law are inconsistent with the Charter

II. Conditions (6)
1. Questions of law (4)

- Interpretation of national law
  - Provisions or concepts in national law that need to be interpreted in accordance with Community law; importance of uniform application of Community law. The ECJ does in principle not question the national courts' reasons for questions
  - Cases C-297/88 and C-197/89, *Dzodzi*
  - Case C-28/95, *Leur-Bloem*
  - Case C-280/06, *Autorità Garante della Concorrenza/ETI SpA and Others*
- However, application of a directive to facts prior to accession, ECJ not competent (Case C-302/04, *Ynos/Varga*)
- 'Purely' national law is excluded (Case C-144/95, *Maurin*)

II. Conditions (7)
2. Questions on interpretation and validity (1a)

- Interpretation, validity and effect
  - Grounds for invalidity: Article 263
- Effect: ECJ does not rule on the validity of national law:
  - "*it is not for the Court, in the context of Article [267] […], to rule on the compatibility of a national law with Community law*"
- However:
  - *"[the ECJ] does have the jurisdiction to provide the national court with all the elements of interpretation […] to enable it to assess that compatibility"* (Cases 91 and 127/83, *Heineken*)
- Often rephrasing: "*Is rule A [national law] valid in view of Articles …… TFEU*", becomes "*the national court wants to know whether Articles …. TFEU prohibit a national rule which ….*"

II. Conditions (8)
2. Questions on interpretation and validity (1b)

- Recent case C-379/15, France Nature Environnement
  - National law contrary to EU law
  - Limitation of ex tunc effect of such finding by national court?
  - Yes, under the conditions of case C-41/11, Environnement Wallonie and under the condition of a preliminary reference (in case of a supreme instance) "*so that the Court may assess whether, exceptionally, provisions of national law held to be contrary to EU law may be provisionally maintained in the ligth of an overriding consideration linked to environmental protection and in view of the specific circumstances of the case pending before that national court. That national court is relieved of that obligation only when it is convinced, which it must establish in detail, that no reasonable doubt exists as to the interpretation and application of the conditions set out in the judgment in Inter-Environnement Wallonie*".

II. Conditions (9)
2. Questions on interpretation and validity (2)

- Fact-finding?
  - Facts essential for decision on validity
  - Factual arguments
  - General principles of law
  - Done mostly by the national courts
- ECJ is reluctant to use its fact-finding powers in preliminary proceedings
  - The procedure offers little room for the parties to submit (new) facts
  - Discussion on factual findings of referring court is futile (Conclusion AG Mengozzi, case C-209/10, *Post Danmark*, par. 23)

II. Conditions (10)
2. Questions on interpretation and validity (3)

- D. Anderson & M. Demetriou, References to the European Court, p. 85 (3-096)
  - *"There is an undoubted gap between the extensive nature of the […] Court's jurisdiction […] and the rather rudimentary methods of fact-finding that it […] employs."*
- R. Duk, Article 177 EC: Experiences and problems
  - *"[267] proceedings do not provide for the guarantees normally accorded tot the parties with regard to such judicial fact-finding."*

II. Conditions (11)
3. Before a national court (1)

- Community law concept
  - Qualification under national law of a court is irrelevant
  - Case 246/80, *Broekmeulen*
  - Sometimes a national court doubts its own qualification as national court: case C-169/08, *Regione Sardegna*; reference from the Italian constitutional court
- How does a court qualify?
  - There are eight cumulative criteria
  - Or six? Case C-210/06, *Cartesio*, rec. 55

II. Conditions (12)
3. Before a national court (2)

- Criterion 1: established by law? (Case C-54/96, *Dorsch*, rec. 24-25)
- Criterion 2: permanent?
- Criterion 3: compulsory jurisdiction? (Case 246/80, *Broekmeulen*, rec. 15)
  - Judgment binding on parties?
  - Necessary for parties, to resolve dispute?
  - Arbitration usually excluded

II. Conditions (13)
3. Before a national court (3)

- Criterion 4: procedure *inter partes*?
  - No longer an absolute criterion (Case C-210/06, *Cartesio*, rec. 56)
  - *Ex parte* referrals usually allowed
  - Some criticism as to relaxation

- Criterion 5: applies rule of law?
  - Normally accepted without ado
  - Adjudication based on fairness enough? (Case C-393/92, *Almelo*)
  - Court must be required to apply EC law (Case 246/80, *Broekmeulen*)

II. Conditions (14)
3. Before a national court (4)

- Criterion 6: independent?
  - Of the parties
    - Interested parties cannot refer
    - Prosecution in Italy tried; it could not
  - Of the administration
    - ECJ looks at composition court or tribunal, rules on appointment, removal from office etc. (e.g. case C-517/09, RTL, on the status of the Collège d'autorisation audiovisuel: not admissible)
  - Critique
    - Heavy criticism, e.g. in *Dorsch Consult*
    - Gradual relaxation is deemed undesirable
    - RvS, House of Lords, professional associations

II. Conditions (15)
3. Before a national court (5)

- Criterion 7: judicial decision?
  - Goes to the nature of the proceedings
  - 'Judicial'
    - Purely administrative actions are excluded (nomination liquidator, Case C-497/08, Anniraike Berlin)
    - Declaratory proceedings may be admissible
    - The sames goes for "test cases"
  - Critique
    - Obscure concept
    - No clear test of independence
    - At times a court; and sometimes not
  - Example: Case 440/98, RAI; Italian Court of Auditors: Court does not have jurisdiction

II. Conditions (16)
3. Before a national court (6)

- Criterion 8: must be 'in Member State'
  - MS define their own territory
  - Problematic
    - Isle of Man, Channel Islands were admissible
    - Other European territories, e.g. Gibraltar?
    - French *départements d'outremer*: admissible
    - Other overseas countries and territories?

II. Conditions (17)
4. Decision ECJ necessary for decision of the national court (1a)

- ECJ accepts in principle the national court's finding on the necessity of the reference to the ECJ: presumption of relevance (Case C-458/06, *Skatteverket*)
- Case Rheinmühlen I (166/73): national law cannot limit the competence of a lower court to make references (also: case C-173/09, *Elchinov*)
- However
  - A question will be rejected if it is obvious that it does not have a relation with the subject matter of the case (Case C-230/96, *Cabour*);
  - Or is irrelevant (Case C-412/93, *Leclerc-Siplec*), or if the question concerns a provision of EU law which is not applicable to the facts (case C-85/95, *Reisdorf*; case C-484/08, *Ausbanc*)
  - Or concerns a purely internal situation (case C-97/98, *Jägerskiöld*; case C-245/09, *Omalet*)
  - Hypothetical disputes and test cases may be refused (Cases 104/79 and 244/80, *Folgia/Novello*)

II. Conditions (18)
4. Decision ECJ necessary for decision of the national court (1b)

- Examples: in case C-210/06, *Cartesio*, rec. 67, the court mentions three cases where a judgment will be refused; similarly in Case C-458/06, *Skatteverket*, rec. 25: "*… where it is obvous that the interpretation of [EU] law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer …*"

II. Conditions (19)
4. Decision ECJ necessary for decision of the national court (2)

- Constant (and increasing?) number of inadmissibility decisions of the ECJ
- References can be manifestly inadmissible: insufficient details of the legal and factual context in the reference judgment, which is the more important where the ruling may have far-reaching consequences
- Examples
  - Case C-320/90 a.f., *Telemaricabruzzo/Circostel*
  - Cases C-386/92, *Monin* and C-387/92, *Banchero: "The information available to the Court…does not enable it to [decide the question]…[it is] necessary that the national court define the factual and legislative context…or, at the very least, explain the factual cicumstances…."*
  - Case C-603/11, *Hervé Fontaine/Mutuelle*: the referring court should at least explain the factual circumstances: the need for precision with regard to the legal and factual context is especially important in competition cases.

II. Conditions (20)
4. Decision ECJ necessary for decision of the highest national court (1)

- Referral obligatory for supreme courts when there is no possibility of appeal
  - *"Where its decisions may be appealed to a supreme court, a national court or tribunal is not under the obligation referred to in the third paragraph of Article 234 EC to refer a question to the Court of Justice for a preliminary ruling even if examination of the merits by the supreme court is subject to a prior declaration of admissibility"*
  - Case C-99/00, *Kenny Roland*: "*… even if the examination of the merits by the supreme court is subject to a prior declaration of admissibility*" (e.g.: leave to appeal, Revisionszulassung)

II. Conditions (21)
4. Decision ECJ necessary for decision of the highest national court (2)

- Summary proceedings/injunctions (*Einstweilige Verfügung, kort geding, référé*): no obligation (even in last instance)
  - Case 107/76, *Hoffmann-La Roche/Centrafarm*)
- Acte éclairé: no obligation
  - Cases 28-3-/62, *Da Costa*
  - Case 283/81, *CILFIT*
- Acte clair: no obligation
  - "the correct application of Community law is so obvious as to leave no doubt…"
  - Case 283/81, *CILFIT*

27

II. Conditions (22)
4. Decision ECJ required (1)

- Decision that Community act is illegal can only be made by the ECJ (Case 314/85, *Foto Frost*)
- and requires reference, also if a similar act was already found illegal by ECJ
  - Case C-461/03, *Gaston Schul*
- Legality check on the basis of the grounds submitted by the referring court (case C-21/13, *Simon Evers*)
- Strict conditions for injunctive relief pending decision on illegality by ECJ; obligation to refer
  - Case *Zuckerfabrik Süderdithmarschen*
  - Also where another case is still pending: case C-453/03 a.o., *ABNA*

28

II. Conditions (23)
4. Decision ECJ required (2)

- National court can lease the invalidity claim aside in case that issue could have been addressed by the party involving the invalidity in a direct appeal to the General Court, but has not been (Case C-188/92, *Deggendorf*) (on the condition that the admissability of such appeal is beyond doubt)
- ECJ may declare a preliminary reference on validity inadmissible in case the invalidity appeal should be inadmissible in the national procedure on the basis of the Deggendorf case law (case C-343/09, *Afton*; case C-494/09, *Bolton Alimentari*)

III. Consequences of the judgment (1)

- Success of preliminary proceedings not only in numbers, but also in effect
- Many – if not all - major issues of European Union law have been established in preliminary proceedings: direct effect, effective protection of individual's rights, liability of MS for violation of Community law etc.
- Is success a problem: AG Jacobs, Case C-338/95, *Wiener* on the tariff qualification of 'nightdresses for women', par. 17-20: "*I do not consider that is appropriate, or indeed possible, for the Court to continue to respond fully to all references, which, through the creativity of lawyers and judges, are couched in terms of interpretation …*" He called for "*self restraint*" for the national courts and the ECJ

III. Consequences of the judgment (2)

- ECJ can rephrase the questions and complement legal grounds
  - Case C-183/95, *Affish*
- No possibility to include new questions
  - Cases C-236/02, *Slob* and C-496/02, *Slob II*
  - Compare case C-212/91, *Angelopharm*, where the court suggested that another set of rules might apply
- Binding upon the referring court
  - Case 29/68, Milchkontor
- Binding upon other courts
  - Ruling on validity has authority erga omnes? Invalidity is binding (Case 66/80, *ICC*)
  - Ruling on interpretation? Compare case law on acte éclairé. Operative part binding.

III. Consequences of the judgment (3)

- Interesting cases of angry or unsatisfied national courts
- Case C-206/01, *Arsenal*: referring court refused to accept the ECJ's application of the rule of law to the facts. Criticism justified? In quite a number of preliminary judgments one cannot escape to find that the ECJ not merely decides the applicable rule of law but applies it to the facts, which is not (always) within the division of the tasks between ECJ and referring court
- Cases C-356/98 and C-466/80, *Kaba*: refusal of ECJ to allow a response to the Opinion AG in the first case, triggered repeated questions

III. Consequences of the judgment (4)

- Effect ex tunc
  - ECJ interprets the rule of law as it should have been understood. NB: ECJ can change its own case law (Case C-10/89, *Kaffee Hag*)
- Temporal restriction imposed
  - ECJ imposes restriction in exceptional cases only, both in judgments on interpretation and validity
- Examples:
  - Case 43/75, *Defrenne II*
  - Case C-38/90, *Lomas*

33

IV. Practical and procedural issues (1)

- National court sends request for a preliminary judgment to ECJ
- Parties in national proceure are invited to submit written observations (+MS, Community institutions). No intervention of interested parties (cases C-403/08 and C-429/08, *Football Association*)
- Also in preliminary references: EEAMS and EFTA authority
- Written observation: 2 months
- Hearing (optional)
- Opinion AG
- No response to the Opinion AG (Case Emesa, C-17/98; *ECHR Kokkelvisserij*, 20.1.2009)

34

IV. Practical and procedural issues (2)

- Legal representation
- Languages
- Incidents
  - Subsequent developments in the national procedure (e.g. Case C-210/06, *Cartesio*; Case C-155/11 *PPU, Imran*
  - In the *Imran* case: appeal against national decision, reference, national decision withdrawn, reference maintained on Imran (also) "*considered a claim for damages*". ECJ: this eventuality is hypothetical in this stage. Inadmissible)
- Should Supreme Court wait for outcome of a reference by a lower court, in case it considers the matter an acte clair? (Case C-197/14, *Van Dijk*, pending)
- Annulment of referral judgment (Case C-525/06, *Nationale Loterij*)

35

IV. Practical and procedural issues (3)

- Who has to notify the ECJ? Case C-241/09, *Flaxys*: parties? Referring court wanted to maintain case. Court: national legal framework has changed, "*no need to answer*"
- Accelerated procedure (Article 55(2) and 104bis RoP, now: article 267 (3)
  - E.g. case C-127/08, *Metock*
  - Conditions
- Request for information
  - Article 104(5) RoP
- Costs

36

Conclusion

- Preliminary procedure: "*by far the most important aspect of the judicial system of the Community"* (Jacobs, Durand)
- In a peculiar way confirmed by the political emotions preliminary judgments may provoke
- The preliminary procure *"has reduced the democratic deficit which has blighted the Community since its inception*" (Mancini, Keeling)
- Apart from critical remarks to be made, it is in legal practice the most important legal instrument for structural legal integration and respect for the Union rule of law

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Litigating at the General Court
Direct actions

General Court

- **Composition:** 1 judge from each Member State (44 judges - 19 September 2016)
- **Appointment:** Proposal of the government of the Member State and consultation of a panel responsible for giving an opinion on candidates' suitability
- **Term of office:** 6 years, renewable
- **President:** appointed among Judges by Judges – 3 years
- **Advocate General:** Unlike the Court of Justice, it does not have permanent Advocates General. That task may be carried out by a Judge in exceptional circumstances
- **Hearings:** Cases heard by Chambers of 5 or 3 Judges (in some cases, as a single Judge) Grand Chamber (15 Judges) when justified by legal complexity or case importance

Jurisdiction

- Actions brought by natural or legal persons against acts of the institutions, bodies, offices or agencies of the EU (which are addressed to them or are of direct and individual concern to them) and against regulatory acts (which concern them directly and which do not entail implementing measures) or against a failure to act on the part of those institutions, bodies, offices or agencies; for example, a case brought by a company against a Commission decision imposing a fine on that company;
- Actions brought by the Member States against the Commission.
- Actions brought by the Member States against the Council relating to acts adopted in the field of State aid, trade protection measures (dumping) and acts by which it exercises implementing powers.
- Actions seeking compensation for damage caused by institutions or bodies, offices or agencies of the European Union or their staff.
- Actions based on contracts made by the European Union which expressly give jurisdiction to the General Court.
- Actions relating to intellectual property brought against the Office for Harmonisation in the Internal Market (Trade Marks and Designs) and against the Community Plant Variety Office.
- Disputes involving the European Union civil service .

How to bring an action - Question of admissibility

- General rule: the applicant is the addressee of the contested act
- Exception: "direct and individual concern"
- **Direct concern** - Measures affecting the applicant's legal position
  - Not met when the authorities entrusted with the implementation of the act contested have discretion (e.g. Directives)
- **Individual concern –** When affecting a natural or legal person "by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed by the act" (Case 25/62, *Plauman/Commission*)
  - Praxis – Depending on the type of act

Individual concern by type of act contested

- **Decision** – It is sufficient for the applicant to show that, when the decision was adopted, it was part of a closed class of persons concerned by that act.

- **Measure of general application -** The fact that an act of general application is applicable only to a small number of individuals, that certain market participants are affected more harshly in economic terms than their competitors or that different specific consequence's may ensue for the various persons to whom the contested measure applies is not sufficient to show that the persons in question are individually concerned by the measure.
  - **3 scenarios to be considered as individually affected**
    - Where the act adversely affects specific rights of the applicant (only once in case-law – Case C-309/89 – *Codorniú/Council*)
    - When, in adopting the act, the specific circumstances of the applicant should have taken into account (*e.g.* right to be heard)
    - When contested act mentions applicant's name

- **Refusal of an institution –** An action for annulment may be brought by a natural or legal person against an institution's refusal to adopt an act only if an application brought against the act refused would have been admissible

Main types of acts

- **Decisions finding an infringement or rejecting a complaint** – Addressees and persons lodging the complaint
- **Merger control** – addressees and competitors
- **Public contracts** – Undertakings in the public tender procedure
- **State aid cases**
- Relating to general aid regimes
  - Considered as a measure of general application
  - Competitors do not have standing
  - Beneficiaries – If they are an *actual beneficiary* (not *potential*) and are affected by a decision of recovery

- Relating to individual aid measures
  - If, prior to implementing the aid measure, it is notified to the Commission, it can find that (i) the measure is incompatible: potential beneficiaries have standing or (ii) it is incompatible: persons having submitted observations have standing
  - Once implemented the measure – if the Commission finds it (i) incompatible: the undertakings for which the aid measure was intended can challenge this decision; (ii) compatible: it can be contested by competitors having played a significant role in the investigation procedure

Written part of the procedure

- **Article 119 et seq. (Title IV) of the Rules of Procedure of the General Court**
  - Obligation to be represented by an agent or lawyer
- **Application - Formal requirements**
  - 2 months
  - Name and address of the applicant
  - Name of the party against whom the application is made
  - Subject-matter of the proceedings
  - Pleas in law and arguments supported by any evidence
  - Form of order sought
  - Should not exceed 50 pages
  - Failure to comply with these requirements renders the application inadmissible
- **Defence**
  - Same formal requirements
  - To be lodged within 2 months, extended on account of distance by a single period of 10 days

- **Reply and rejoinder**
  - Upon request
  - Purpose: make clear the position/refine arguments
    - President may specify the matters to which reply and rejoinder should relate
  - Extension: up to 25 pages - may be reduced and fixed by Court
  - Submission: time-limits set by the Court

- **Application for suspension or interim measures (interim proceedings)**
  - By a separate document stating
    - Subject-matter of the proceedings
    - Circumstances giving rise to urgency
    - Pleas of fact and law
  - Application served on the opposite party to submit written or oral observations
    - If extreme urgency: President may grant the application provisionally even before such observations have been submitted

- **Intervention in direct actions**
  - Application to intervene
    - Member States, European bodies and other public bodies
    - Legal or natural persons having direct interest
    - To support the form of order sought by one of the parties
    - Submission within 6 weeks from publication
  - Statement in intervention
    - 1 month since reception of procedural documents
    - 20 pages
  - Observations on the statement of in intervention – 15 pages

Important to remember

The following information must appear on the first page of each procedural document:

- (a) the case number (T-…/..), where it has already been notified by the Registry;
- (b) the title of the procedural document (application, defence, response, reply, rejoinder, application to intervene, statement in intervention, plea of inadmissibility, observations on …, replies to questions, etc.);
- (c) the names of the applicant, of the defendant, of the intervener, if any, and of any other party to the proceedings in intellectual property cases and appeals against decisions of the Civil Service Tribunal;
- (d) the name of the party on whose behalf the procedural document is lodged.

- Each paragraph of the procedural document must be numbered consecutively.

Important to remember

- Handwritten signature
- Procedural documents must be submitted in such a way as to enable them to be processed electronically by the Court and, in particular, enabling their digitalisation and character recognition. Accordingly, the following requirements must be complied with:

  - (a) the text, in A4 format, must be easily legible and appear on one side of the page only;
  - (b) documents produced in paper format must be assembled in such a way as to be easily separable (not bound together or permanently attached by other means, such as glue or staples);
  - (c) the text must be in a commonly-used font (such as Times New Roman, Courier or Arial) in at least 12 point in the body of the text and at least 10 point in the footnotes, with single line spacing, and upper, lower, left and right margins of at least 2.5 cm;
  - (d) the pages of each procedural document must be numbered consecutively.

Important to remember

- Each application must be accompanied by a **summary of the pleas** in law and main arguments relied on, designed to facilitate the drafting of the notice prescribed by Article 79 of the Rules of Procedure. Since the notice is required to be published in the Official Journal of the European Union in all the official languages, it is requested that the summary not exceed two pages and that it be prepared in the language of the case in accordance with the model available online on the Internet site of the Court of Justice of the European Union.

Action brought on 24 November 2010 - DTS Distribuidora de Televisión Digital v Commission (Case T-533/10)

Language of the case: Spanish

Parties

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

Defendant: European Commission

Form of order sought

Annul Commission Decision C(2010) 4925 final of 20 July 2010, and order the Commission to pay the costs of the present proceedings.

Pleas in law and main arguments

The applicant in the present proceedings, a satellite pay TV operator, challenges Commission Decision C(2010) 4925 final of 20 July 2010 'on the State aid scheme No C 38/2009 (ex NN 58/2009) which Spain is planning to implement for Corporación de Radio y Televisión Española (RTVE)', which declared that that scheme, as amended by Law 8/2009 of 28 August 2009 on financing Corporación de Radio y Televisión Española, was compatible with the common market, without its being necessary to analyse the scheme's method of financing.

The applicant submits that the Commission was not entitled to authorise the aid scheme in question without analysing the method of financing introduced by the above-mentioned Law and, specifically, the 1.5% tax on the gross operating income of pay-TV broadcasters.

In support of its claims the applicant puts forward the following pleas in law:

- Error of law on the part of the Commission, by authorising the aid which is the subject-matter of the proceedings without analysing its method of financing. In that connection, it is submitted that it is settled case-law that aid cannot be considered separately from the effects of its method of financing if that method forms an integral part of the aid, and that, with regard to the present case, the 1.5 % tax on the gross operating income of pay-TV broadcasters forms an integral part of the aid scheme, which is why the Commission ought to have analysed the scheme and the aid together.

- Infringement of Article 106(2) TFEU, in that the Commission authorised an aid scheme which fails to observe the principle of proportionality, since the taxes financing the scheme involve a serious distortion of competition, in the content acquisitions market and in the downstream viewers' market, contrary to the common interest.

- Infringement of Articles 49 and 63 TFEU. In the applicant's submission, the Commission infringed those provisions, in so far as the method of financing the aid authorised restricts freedom of establishment and the free movement of capital, by making it less attractive for pay TV operators and other investors established in other Member States to exercise those freedoms.

Important to remember

- The schedule of annexes must appear at the end of the procedural document. Annexes submitted without a schedule of annexes will not be accepted.
- The schedule of annexes must indicate, for each item annexed:
  - (a) the number of the annex (by reference to the procedural document to which the items are annexed, using a letter and a number: for example, Annex A.1, A.2, ... for annexes to the application; B.1, B.2, ... for annexes to the defence or to the response; C.1, C.2, ... for annexes to the reply; D.1, D.2, ... for annexes to the rejoinder);
  - (b) a short description of the annex (for example: 'letter', followed by its date, author and addressee and the number of pages);
  - (c) the page numbers of the first and last pages of each annex, according to the consecutive page numbering of the annexes (for example: pages 43 to 49 of the annexes);
  - (d) the page reference and paragraph number in the procedural document where that item is mentioned and its relevance is described.

RELACIÓN DE ANEXOS

Anexo F.1: Extracto del Informe Anual para 2009 de la Comisión del Mercado de las Telecomunicaciones (CMT), incluyendo el Índice, el Capítulo 3.5 "Servicios Audiovisuales" (páginas 130 a 159), el Índice relativo a actividades audiovisuales (página 259) y las Estadísticas relativas a los "Servicios de Televisión y Radio" (páginas 319 a 325) **(citado en el apartado 10, página 4, en la nota a pie de página 12, página 4, en el apartado 20, página 7, en el apartado 22, página 8, nota a pie de página 27, página 9)**

Anexo F-2: Cuentas Anuales, Memoria, Informe de Gestión e Informe de Gobierno Corporativo para el ejercicio 2009 del Grupo PRISA, grupo en el que se integra la demandante DTS **(citado en las notas a pie de página 15, 16, 17, 18 y 19, página 5)**

Anexo F-3: Intervención del Consejero Delegado y Presidente de la Comisión Ejecutiva de PRISA a la Junta General Extraordinaria de Accionistas, celebrada en Madrid, el 27 de noviembre de 2010 **(citado en el apartado 15, página 6)**

Anexo F-4: Ley 17/2006, de 5 de junio, de la radio y la televisión de titularidad estatal (BOE 6 junio 2006, núm. 134, pág. 21207), versión vigente **(citado en la nota a pie de página 20, página 7)**

Anexo F-5: Informe del Tribunal de Defensa de la Competencia de 26.2.2007; expediente C102/06 (Concentraciones)-SOGECABLE/AVS **(citado en el apartado 20, página 7 y en la nota a pie de página 23, página 7)**

Anexo F-6: Resolución de Comisión Nacional de la Competencia de 28.1.2010; expediente S/0020/07 TRIO (PLUS) **(citado en el apartado 20, página 7, en la nota a pie de página 23, página 7 y en la nota a pie de página 24, página 8)**

Anejo F-7: Informe de MundoPlusTV **(citado en el apartado 23, página 8)**

Anexo F-8: Declaración intermedia sobre los resultados de enero a septiembre de 2010, registrada oficialmente en la Comisión Nacional del Mercado de Valores con fecha 8 de noviembre de 2010 **(citado en el apartado 27, página 10 y en el apartado 38, página 14)**

Anexo F-9: Ley 7/2010, de 31 de marzo, General de la Comunicación Audiovisual (BOE 1 de abril de 2010, núm. 79 (pág. 30157) **(citado en las notas a pie de página 28 y 29, página 11)**

Anexo F-10: Oferta Básica de Digital + **(citado en la nota a pie de página 30, página 11)**

Anexo F-11: Presentación relativa a las tarifas publicitarias de Digital + **(citado en la nota a pie de página 32, página 12)**

Anexo F-12: Presentación relativa a las tarifas publicitarias de Digital + **(citado en la nota a pie de página 32, página 12)**

Oral part of the procedure

- **Organisation of the hearing**
  - Arranged by the Court whenever it is likely to contribute to a better understanding of the case
    - Whether or not a request to that effect has been made by the parties
  - Request for a hearing
    - As soon as parties receive notification of the end of the written part
    - Should not exceed 3 pages
    - Assessment of the benefit of a hearing to the party

- **Oral submissions**
  - The members of the Court usually hold a short meeting with the representatives of the parties about the organisation of the hearing
    - May invite parties to focus on certain issues at the hearing
  - Speaking time fixed by the President – normally 15 minutes
  - 1 person speaking for each party (unless authorisation)

- **Questions of the Court**
- **Replies - to react succinctly to observations made or questions put during the hearing**

Tips for the oral pleadings

Generally

- Take real care to justify the need for a hearing
- Bear in mind that the Court will normally expect oral pleadings to be made by a single advocate: it may be necessary to press for two to be permitted
- Once allotted a time for the main pleading (normally 15 mins) this time limit will be strictly adhered to unless an extension is granted in advance on written application to the Registry – at least 2 weeks before the oral pleading
- Contact the Registry by e-mail or telephone to ask which parties are attending the oral hearing (and to obtain their advocates' contact details if needed)
- Confer, if possible, with parties with the same interest to agree which party is to focus on which argument

What to expect

- After arrival at the Courtroom, one of the interpreters is likely to ask for a copy of any speaking notes you have for your presentation - so bring a spare copy
- Bring your robe with you
- Immediately before the hearing commences, the Registrar or his representative will invite the advocates who are pleading to meet the Judges - a frequently asked question is whether you are going to need all of the time that has been allotted. On occasion the President of the formation will ask the advocates to address certain issues or to deal with a specific question
- Questions may be asked by the Judges and the Advocate General - you must be prepared to answer questions both on the facts and on the law (in particular on the applicable national law)
- Ensure that colleagues or clients who may be able to assist with questions are seated in such position as to be able to assist the speaker in responding to questions

The oral pleadings itself

- Focus on the members of the Court - and in particular the reporting judge, the President of Chamber and the Advocate General (indicated on a sheet of paper attached to the lectern
- Speak from the lectern at all times (including questions) and prepare your papers, earpiece, etc. accordingly
- Speak into the microphone (otherwise the interpreters cannot hear you!) and adjust it for height
- Reading out a written speech runs the risk that you speak too quickly, fail to keep the attention of the Court and lack flexibility to deal with the points made by others
- Ideally speak freely, with your head up, using a normal conversational style & speed
- Do not feel bound to follow any speaking notes given to the interpreters which is simply a general guide
- Speak particularly clearly when giving numbers and references
- Avoid literary flourishes, jokes and idiomatic speech - they translate poorly

DECISIONS

COMMISSION DECISION

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)

(notified under document C(2010) 4925)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2011/1/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having regard to Protocol No 29 on the system of public broadcasting in the Member States annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union [1],

Having called on interested parties to submit their comments pursuant to the provisions cited above [2] and having regard to their comments,

Whereas:

I. PROCEDURE

(1) On 22 June 2009, the Commission received a complaint drawing attention to plans of the Spanish government to amend the system of financing of the national radio and television broadcaster *Corporación de Radio y Televisión Española* (RTVE). On 5 August 2009 the Commission requested information from Spain concerning this amendment, in particular on the relationship between the new levies and the funding of RTVE. On 1 September 2009 the new Law 8/2009 of 28 August 2009 on financing Corporación de Radio y Televisión Española [3], amending Law 17/2006 of 5 June 2006 on state-owned radio and television [4], entered into force. On 21 September, 22 and 26 October 2009 Spain submitted the requested information on the scheme to the Commission.

(2) By letter dated 2 December 2009, the Commission informed Spain that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (TFEU) in respect of the measure. The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* [5]. The Commission invited interested parties to submit their comments on the aid measure.

(3) Spain responded to the decision to open the procedure by letter of 21 December 2009. The Commission received comments from interested parties. It forwarded them to Spain, which was given the opportunity to react; its comments were received by letter dated 23 March 2010.

(4) The Commission asked additional questions by letters of 19 February and 19 May 2010, to which the Spanish authorities responded by letters of 22 March and 31 May 2010.

(5) On 18 March 2010, by a letter of formal notice pursuant to Article 258 TFEU, the Commission opened infringement proceedings on the grounds that the tax 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) [6], which lays down precise rules relating to the administrative charges that Member States can levy on companies providing a telecommunications service or network. The State aid investigation is without prejudice to the infringement procedure.

[1] OJ C 115, 9.5.2008, p. 312.
[2] OJ C 8, 14.1.2010, p. 31.
[3] Official State Gazette [*Boletín Oficial del Estado- BOE*)] 210, 31.8.2009, p. 74003.
[4] Official State Gazette 134, 6.6.2006, p. 21207.
[5] See footnote 2.
[6] OJ L 108, 24.4.2002, p. 21; concerning the infringement procedure see Commission press release IP/10/322.

II. **DETAILED DESCRIPTION OF THE MEASURE**

The current system of financing public broadcasting in Spain

(6) The current system of financing public broadcasting in Spain by RTVE, as established by Law 17/2006, was approved by the Commission in decisions in 2005 and 2007 ([7]). Law 17/2006 entrusts the RTVE with a public service mission. Section I of that law (in particular Articles 2 and 3) defines the public service mission of RTVE and specifies that the mission for television and radio services respectively would be performed by the companies RTVE (*Radio Televisión Española*) and RNE (*Radio Nacional de España*). Section II, Chapter IV, regulates the financial and economic framework conditions under which RTVE will operate its public service tasks. In particular, Article 33 stipulates that RTVE will receive annual budgetary payments as compensation for the fulfilment of its public service tasks. This compensation shall not exceed the net cost of the public service provided by RTVE and RNE respectively. Section II, Chapter VI regulates external control by the Parliament, the audiovisual authority and the Court of Auditors.

(7) The annual budgeted expenses for running RTVE were EUR 1 177 million in 2007, EUR 1 222 million in 2008, and EUR 1 146 million in 2009. During these last years RTVE received a public service compensation of around EUR 500 million per year (2006: EUR 575 million; 2007: EUR 433 million; 2008: EUR 500 million; 2009, however, with already reduced advertising revenues: EUR 726 million).

The reform of the financing of RTVE

(8) Law 8/2009 amends Law 17/2006 with regard to the definition of the public service mission and the possible commercial activities of RTVE. It adds further elements to the public service mission which were approved by the Commission in 2005. In particular, it limits the acquisition of broadcasting rights for sports events of general interest or great interest for society, except for the Olympics and Paralympics, to 10 % of the total annual budget for external supplies, purchases and services (Article 9(1)(i)). It states obligations with regard to programmes for children (Article 9(1)(d)) and limits the broadcasting of films produced by the major international producers for first release at peak times to 52 films per year (Article 9(1)(m)).

(9) The new law provides in particular that the use of advertising, teleshopping, sponsorship and pay-per-view services as sources of revenue will be discontinued by the end of 2009. These commercial revenues shall be replaced by funds generated by existing or new charges on commercial broadcasters and telecommunication operators. Spain expects that the measure will relieve pressure from commercial operators, increase their revenues from advertising and eliminate a potential source of market distortion. RTVE will retain as sources of commercial income the provision of services to third parties and the sale of its own productions (altogether around EUR 25 million).

(10) So far, annual advertising revenues accounted for around EUR 600 million (2007: EUR 667 million; 2008: EUR 565 million). With the disappearance of this commercial income, the net costs for RTVE's public service broadcasting mission will be nearly identical to the annual budgeted expenses of operating the broadcaster. Accordingly, Spain intends to compensate for the abolition of these revenues by raising its own contribution from public funds up to the annual budgeted expenses of operating RTVE, reduced only by the minor remaining commercial revenues of EUR 25 million mentioned in the previous paragraph.

(11) As overall annual income of RTVE, Article 3(2) of the new law provides, for the years 2010 and 2011, for a maximum amount of EUR 1 200 million, for the years 2012-2014 a maximum increase in this amount of 1 % and for the subsequent years an increase based on the annual consumer price index. When determining these amounts, Spain estimated, in comparison with the annual budgeted expenses of RTVE in previous years, additional annual expenditure of EUR 104 million to fill the air time previously reserved for advertising with other audiovisual productions.

Fiscal measures linked to the reform

(12) According to Spain's budgetary planning, this overall amount of annual income will be composed of allocations from the general state budget, according to the scheme provided for in Law 17/2006, of about EUR 500 million, which is in line with the amount contributed in previous years, and through new income generated from three fiscal measures introduced or modified by Articles 4, 5 and 6 of the new law:

(a) A tax of 3 % of the revenues of free-to-air TV broadcasters and of 1,5 % of revenues of pay-TV broadcasters. These contributions must not exceed 15 % (for free TV) and 20 % (for pay-TV) of the total annual support for RTVE. Any surplus tax revenue beyond these percentages will go to the general state

([7]) Cases E 8/2005, State aid in favour of the Spanish national broadcaster RTVE, and NN8/07, financing of workforce reduction measures of RTVE.

budget. The tax applies only to entities established in Spain. Services imported from another Member State are not subject to this tax.

(b) A tax of 0,9 % on gross operating revenues (excluding those obtained in the wholesale reference market) of telecommunications services operators registered with the register of operators of the Spanish telecoms regulator, Comisión del Mercado de las Telecomunicaciones, in any of the following services: fixed telephony, mobile telephony and Internet access provision. Operators subject to the tax must be operating nationwide or in more than one Autonomous Community and must provide audiovisual services or another service that includes advertising. This contribution must not exceed 25 % of the total annual support for RTVE. Any surplus tax revenue beyond this percentage will go to the general state budget. The tax applies only to entities established in Spain. Services imported from another Member State are not subject to this tax.

(c) A share of 80 %, up to a maximum amount of EUR 330 million, of the already existing levy on radio spectrum use as established by Law 32/2003 of 3 November 2003. The remainder will be attributed to the general budget. This percentage can be modified in accordance with the General State Budget laws.

(13) Articles 5 and 6 of Law 17/2006 expressly state that the taxes on commercial TV and telecommunications operators are collected 'for the purpose of contributing to the financing of RTVE'. Furthermore, the preamble expressly establishes this link between the new taxes and the financial compensation for withdrawing RTVE from the advertising market.

(14) Should the revenue from these three tax sources not be sufficient to cover the gap of EUR 700 million between the traditional public service compensation (EUR 500 million) and the overall costs of running RTVE, which have so far been covered by commercial revenues, Article 2(2) of Law 8/2009 establishes that the missing funds would be contributed from the general state budget, in accordance with Article 33 of Law 17/2006 which obliges the government to cover the net costs of the public service obligations of RTVE. This means that the financing of the net costs of the public services provided by RTVE, up to a maximum amount of EUR 1 200 million, will be assured, independently of the revenue generated by the taxes.

(15) Spain confirmed that the contribution from the taxes on TV broadcasters and telecommunications operators should not necessarily be used only to fund RTVE. Spain has established the maximum amounts which may be contributed by the taxes. Any surplus revenue will be attributed to the general state budget and may thereby be used to cover other expenses. Furthermore, up to these maximum amounts, Spain may decide what amount from the tax it actually intends to allocate for RTVE. The budgetary planning for 2010, for example, provides for less than half the possible maximum contribution to be allocated to RTVE.

Other new financial provisions

(16) In order to avoid overcompensation, Article 8 of the new law provides for a reserve fund into which is paid the part of the revenues allocated by the government which exceeds the actual net costs of the public service obligation. This reserve is limited to 10 % of the annual budgeted expenses of RTVE. Any revenues in excess of these 10 % will go back to the Treasury. The reserve will be used to cover possible losses incurred in previous years. If it has not been spent within 4 years, it will be recovered by reducing the public service compensation for the following year accordingly.

(17) Furthermore, in accordance with Articles 37 and 39 to 41 of Law 17/2006, external control by auditors, the Government Audit Office, the Parliament, the audiovisual authority and the Court of Auditors will ensure that RTVE receives no compensation exceeding the actual net costs plus the 10 % reserve. Any revenue from the few remaining commercial activities will reduce the public service compensation (Article 7(1) of Law 8/2009).

Grounds for initiating the procedure

(18) The issues analysed in this decision are those elements of the changes to the existing RTVE financing system concerning which the Commission expressed doubts in the decision to open the formal investigation procedure.

(19) As the Commission stated, the main feature of the changes in the financing of RTVE and the almost complete discontinuation of commercial activities of RTVE is that the part of RTVE's revenues hitherto generated by these commercial activities will be replaced with revenues originating from taxes specifically introduced or amended for that very purpose. The clear references in Law 8/2009 indicate that the amount of the taxes has been set with a view to contributing a certain predetermined part to the financing of RTVE. This link between the financing and the proceeds from the new taxes suggests that the taxes are hypothecated to the aid

granted to RTVE, in the sense that the revenue from the taxes is necessarily allocated for the financing of this aid to RTVE and has a direct impact on the amount of the aid.

(20) The Court has repeatedly held that where the method of financing forms an integral part of the measure, the Commission must necessarily also take into account that method in its consideration of the aid measure ([8]). Where a charge specifically intended to finance aid proves to be contrary to other provisions of the Treaty, the Commission cannot declare the aid scheme of which the charge forms part to be compatible with the internal market. Consequently, the method by which an aid measure is financed may render the entire aid scheme incompatible with the internal market.

(21) The Commission therefore expressed doubts as to whether the new taxes formed an integral part of the measure. If so, their compatibility with the Treaty would have to be assessed by the Commission and would impact on the general legality of the aid scheme. This concern seemed justified, in particular in view of the fact that the Commission has doubts as to the compatibility of the new taxes imposed on undertakings providing fixed telephony, mobile telephony and Internet access services with Directive 2002/20/EC ([9]).

(22) Another issue about which the Commission had doubts was whether, following the reform of the financing system, Spain had established sufficient safeguards against a possible overcompensation. The abolition of advertising may impact on the costs of the broadcaster by making its programming less dependent on commercial considerations.

(23) Moreover, the system of financing RTVE should provide for an adequate procedure for assessing beforehand whether the new services of the public broadcaster RTVE comply with the material conditions of the Amsterdam Protocol ([10]). The information submitted by Spain did not allow the Commission to examine whether Spain already had such a mechanism.

III. COMMENTS FROM INTERESTED PARTIES

(24) Comments from 15 interested parties were received. They came from commercial broadcasters (TF1 and ACT – Association of Commercial TV in Europe), pay TV operators (DTS, Canal Satélite), telephone and Internet service providers (redtel, ONO, AETIC) cable operators (Cable Europe) and advertisers. Some of them asked for their identity to be kept confidential.

(25) Most complainants were arguing against the lawfulness of the new taxes, which in their view would distort competition between public and private TV, between free TV and pay TV, or between operators who only offer telecommunications services and other operators of telecommunications services who also offer audiovisual services. They also raised doubts concerning the compatibility of the tax on electronic communications with Article 12 of the Authorisation Directive 2002/20/EC ([11]).

(26) Broadcasters and Internet service providers also questioned the compatibility of the definition of the public service remit of RTVE. It would not be precise enough and would be too generous regarding the acquisition of broadcasting rights for special sport events or films produced by major international producers. TF1 in particular argued that no ex ante test was in place for the introduction of significant new public services of RTVE.

(27) Regarding the possible hypothecation of the tax to the aid, TV broadcasters and Internet service providers argued that the revenue from the new taxes would have a direct impact on the aid. They were in particular concerned that raising tax revenues could lead to a compensation of RTVE beyond the level of the net costs of providing the public service.

(28) Regarding the proportionality of aid, various TV and Internet operators saw a risk of overcompensation. The budgetary planning for RTVE of EUR 1 200 million, as determined by Law 8/2009, would not be based on a proper calculation of the net costs of the public service. The current annual budgeted costs of RTVE would be an arbitrary basis. It would not differentiate between commercial and public service activities. In particular, the planning would not take into account the cost savings that would be achieved by abolishing advertising, since the programmes would no longer need to attract

([8]) Joined Cases C-261/01 and C-262/01, *Belgische Staat* v *Eugene van Calster, Felix Cleeren and Openbaar Slachthuis*, paragraphs 48 and 49; Case C-174/02 *Streekgewest Westelijk Noord-Brabant*, paragraph 26; Case C-333/07, *Régie Networks*, paragraphs 93 to 112).

([9]) See paragraph 5 above.

([10]) See Commission Decisions E 3/2005 of 24 April 2007, paragraphs 370 and 372; E 8/2006 of 27 February 2008, paragraph 230, and E 4/2005 of 27 February 2008, paragraph 121. This case practice was adopted on the basis of the Communication from the Commission on the application of State aid rules to public service broadcasting (OJ C 320, 15.11.2001) (the 2001 Broadcasting Communication), and further clarified and consolidated in paragraph 88 of the Communication from the Commission on the application of State aid rules to public service broadcasting (OJ C 257, 27.10.2009, p. 1).

([11]) See paragraph 6 above.

large audiences. Production, as in the case of arts programmes, for example, would thus be less costly. Others, however, expressed the fear that RTVE would spend more on high-value programmes.

(29) A possible overcompensation was also seen in the fact that RTVE's losses of advertising income would be fully covered by State funds. This compensation would be calculated on the basis of previous years while the economic crisis would have led to lower commercial revenues in 2010 and thus to lower overall revenues for RTVE. It would not be fair if, with the abolition of dual financing, RTVE were to obtain a guaranteed income, independent from the varying commercial income.

(30) Broadcasters also questioned the existence of an effective system of budgetary control to ensure that only the net costs of the public service provision are covered by public funds.

IV. **COMMENTS FROM SPAIN**

(31) As a preliminary point, Spain contests the fact that in the current procedure the Commission assesses the issues of proportionality and of the ex ante test for significant new services. They would be part of the existing scheme of financing RTVE as approved by the Commission in 2005 and 2007. The opening decision in the present procedure, however, is based on the definition of the reform of the financing system as new aid in the sense of Article 1(c) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([12]). The 'new aid' element would be limited to the financing reform by introducing new taxes and would not alter or affect the other elements of the existing scheme. These other elements would therefore still be existing aid and should not be assessed by the Commission in this procedure.

(32) Regarding the issue of hypothecation of the tax, Spain argues that the new taxes would not form an integral part of the aid and would not have a direct impact on the amount of the aid. Spain emphasised that according to Article 2(2) of Law 8/2009, read in conjunction with Article 33 of Law 17/2006, the only factor for determining the amount of public financing of RTVE is the net costs of the public service, no matter how much revenue is generated by the taxes. The planned costs of the public service do not take into account the revenue generated by the taxes, but are based on the costs of this service in the previous years.

([12]) OJ L 83, 27.3.1999, p. 1.

(33) Spain confirmed that the contribution from the taxes on TV broadcasters and telecommunication operators is not just channelled to RTVE. Instead, the revenues from the taxes will be transferred to the general State budget (State Treasury), from where all the payments to RTVE will be made. Spain has established maximum amounts for the contribution from taxes. Any surplus revenue will be attributed to the general state budget and may thus be earmarked for other purposes. Furthermore, below these maximum amounts, Spain may decide what percentage of the tax it actually intends to allocate for RTVE. The budgetary planning for 2010 provides for example for less than half the maximum possible contribution to be allocated to RTVE.

(34) Spain maintains that higher- or lower-than expected revenues from the new taxes would not lead to changes in the planned amounts for the public service compensation. Should the revenue from the new tax sources not be sufficient to cover the financing gap left by abolishing advertising, the missing funds would be contributed from the general state budget, in accordance with Article 33 of Law 17/2006. Any surplus revenue will be attributed to the general budget. Finally, any excess in income beyond the EUR 1 200 million ceiling set by Article 3(2) of Law 8/2009 would be transferred to the Public Treasury. Therefore the planned overall funding of RTVE's public service mission would not depend on the amount of the specific tax revenues but would in any case be assured by the general state budget.

(35) Regarding the proportionality of the aid, Spain argued that the principle of net cost coverage would be assured. According to Article 33(1) of Law 17/2006, as amended by Law 8/2009, net costs are the only parameter determining the effective amount of the aid. According to Articles 2(2) and 8(2) of Law 8/2009, the general state budget compensates any insufficient tax revenues and any excess revenue is allocated to it, except for the possible overcompensation of 10 % of the annual budgeted costs provided for in Article 8(1) and (2).

(36) With regard to the appropriateness of an annual budgetary planning of EUR 1 200 million for the coming years, Spain does not consider that it has acted arbitrarily. This amount is based on the annual budgeted costs incurred by RTVE in fulfilling its public service obligation. These obligations were not altered in a way that would lead us to expect lower expenses; on the contrary, complainants overlook the fact that RTVE has to invest EUR 104 million in additional productions to fill the air time freed by the disappearance of commercials.

(37) It would furthermore not be right to assume that, following the disappearance of advertising, RTVE would no longer need to attract large audiences and could therefore reduce production costs and offer less attractive transmissions. According to its public service mission, RTVE would be obliged to maintain a distinguished and substantial presence and audience reach among the TV channels, in order to fulfil its mission effectively.

(38) Finally, under Article 37 of Law 17/2006, effective ex post budgetary control would be assured by internal auditing, a review by the Government Audit Office and external auditing by a private auditing firm (KPMG). Furthermore, pursuant to Articles 39 and 40 of this law, the Parliament and the audiovisual authority supervise the fulfilment of the public service mission by RTVE and its annual accounts. Finally, RTVE is subject to review by the Court of Auditors.

(39) Regarding the existence of ex ante control for the introduction of significant new services, Spain advised that Article 41(3) of General Law 7/2010 of 31 March 2010 on Audiovisual Communications ([13]) established such a procedure. The independent Spanish supervisory and regulatory authority for public broadcasting, the Consejo Estatal de Medios Audiovisuales, has been entrusted with this ex ante control, consisting of a public consultation of stakeholders, publication of the results of the consultation, and the evaluation of the overall impact of each new service on the market. Spain furthermore indicated that it intends to sign a programme contract (contrato-programa) with RTVE by 1 November 2010 which will define what constitutes a significant new service. According to the draft of this programme contract, a significant new service will be taken to mean a new service offer clearly differentiated from the services already in place, which can be classified as the reference product market, with the ability to have an effect on the market, in particular in terms of the impact on demand.

V. ASSESSMENT OF THE AID MEASURE

Presence of aid within the meaning of Article 107(1) TFEU

(40) According to Article 107(1) of the TFEU, concerning aid granted by Member States, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

(41) The financial resources included in the Spanish system of financing RTVE flow to and are subsequently released from the general state budget. They constitute a direct transfer of State resources to a specific undertaking which are not available to its competitors. RTVE thereby enjoys a selective advantage.

(42) Nevertheless, in its comments submitted before the opening of the procedure Spain claimed that the reform did not affect trade between Member States, since RTVE did not operate outside Spain. But when State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Union trade, this trade must be regarded as affected by that aid, even if the beneficiary undertaking itself is not involved in exporting ([14]). Similarly, where a Member State grants aid to undertakings operating in the service and distribution industries, it is not necessary for the recipient undertakings themselves to carry on their business outside the Member State for the aid to have an effect on trade in the Union ([15]).

(43) In the light of this principle, the Commission Communications on the application of State aid rules to public service broadcasting of 2001 and 2009 explain that 'State financing of public service broadcasters can also be generally considered to affect trade between Member States …. This is clearly the position as regards the acquisition and sale of programme rights, which often takes place at an international level …. Moreover, the ownership structure of commercial broadcasters may extend to more than one Member State' ([16]).

(44) RTVE is itself active on the international markets (sale of programmes and acquisition of broadcasting rights). Through the European Broadcasting Union it exchanges television programmes and participates in the Eurovision system ([17]). Furthermore, in the acquisition and sale of broadcasting rights, RTVE is in direct competition with commercial broadcasters that are active in the national and international broadcasting market and that have an international ownership structure. Therefore even without the commercial activities RTVE carried out until August 2009, competition on the Spanish market risks being distorted by the aid granted to RVTE in a way which may affect trade between Member States. The Commission has already stated this in decisions E 8/2005 and NN 8/07.

(45) The Commission also considered the possibility that the financing measures could be regarded merely as compensation for public service obligations which would not confer a financial advantage on RTVE, within the meaning of the *Altmark* decision of the Court of Justice ([18]). RTVE is an undertaking entrusted with the

([13]) Official State Gazette 79, 1.4.2010, p. 30157.

([14]) ECJ, judgment of 17 June 1999, Case C-75/97 *Maribel bis/ter* [1999] ECR I-3671, paragraph 47.

([15]) ECJ, judgment of 7 March 2002, case C-310/99 *Italy* v *Commission* [2002] ECR I-2289.

([16]) OJ C 320, 15.11.2001, p. 5, paragraph 18; OJ C 257, 27.10.2009, p. 1, paragraph 22.

([17]) ECJ, judgment of 8 October 2002 in joint cases T-185/00, T-216/00, T-299/00 and T-300/00 *M6 and others* v *Commission* [2002] ECR II-3805.

([18]) Judgment of 24 July 2003, Case C-280/00 *Altmark Trans* [2003] ECR I-7747.

provision of a service of general economic interest (SGEI), public service broadcasting. State measures compensating the net additional costs of a SGEI do not qualify as State aid if all the conditions set out by that judgement are fulfilled. First, the recipient undertaking must effectively discharge public service obligations and those obligations must be clearly defined; second, the parameters on the basis of which the compensation is calculated must have been established beforehand in an objective and transparent manner; third, the compensation must not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant revenue and a reasonable profit for discharging those obligations; fourth, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure allowing for the selection of the offer capable of providing those services at the least cost to the community, the level of the compensation must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with the necessary means to be able to meet the public service requirements, would have incurred in discharging those obligations.

(46) Where public subsidies granted to undertakings expressly required to discharge public service obligations in order to compensate for the costs incurred in discharging those obligations do not comply with all these conditions, such subsidies fall within Article 107(1) of the TFEU and must be regarded as State aid within the meaning of that provision ([19]).

(47) The public entity RTVE was entrusted with the provision of the public service broadcasting as defined by Laws 17/2006 and 8/2009. However, it was appointed as the public service broadcaster by law and not by means of a public tender. Moreover, the Spanish authorities did not determine the level of compensation needed on the basis of an analysis of the costs which a typical undertaking, well run and equipped, would have incurred in discharging those obligations. The level is determined annually on the basis of the current net costs, without using the benchmark of a well-run undertaking. The parameters on the basis of which the compensation would be calculated were not established in advance in an objective and transparent manner. Therefore, not all the conditions set out by the Court are met and the measures under assessment qualify as State aid within the meaning of Article 107(1) of the TFEU ([20]).

([19]) See footnote 18, paragraph 94.

([20]) See the same conclusion in Case E 8/2005, footnote 7, paragraph 46.

Assessment of the existing aid nature of the measures

(48) Spain has not notified the new aid measure. It contends that the measure would not constitute a substantive alteration of the existing aid scheme as amended pursuant to the Commission decision in case E 8/2005 within the meaning of Article 108(3) of the TFEU and would therefore not constitute new aid requiring notification.

(49) According to Article 1(c) of Regulation (EC) No 659/1999, 'new aid' is taken to mean all aid which is not existing aid, including alterations to existing aid. According to Article 4 of the Implementing Regulation (EC) No 794/2004, neither modifications of existing aid of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the internal market nor an increase in the original budget of an existing aid scheme by up to 20 % shall be considered an alteration to existing aid.

(50) In order for an alteration to an existing scheme to qualify as 'new aid', the alteration to the system must be substantial, i.e. the basic features of the system must be altered as would be the case if, for example, there had been changes in the aim pursued, the basis on which the levy was made, the persons and bodies affected or, generally, the source of its finances ([21]). In the present case the sources of RTVE's finances have been substantially changed. The new sources of financing also mean that the financing linked to advertising (which was not aid) is now given by the State (and is aid). This sharp increase in the amount of aid and the switch from a dual funding to single funding system give a clear indication that there is new aid.

(51) Furthermore, if Article 1(c) of the procedural regulation states that alterations to existing aid are to be regarded as new aid, this provision means that 'it is not altered existing aid that must be regarded as new aid, but only the alteration as such that is liable to be classified as new aid', as the Court of First Instance emphasised in the *Gibraltar* case ([22]). It continued that 'it is only where the alteration affects the actual substance of the original scheme that the latter is transformed into a new aid scheme. There can be no question of such a substantive alteration where the new element is clearly severable from the initial scheme' ([23]).

([21]) Opinion of Advocate General Trabucchi delivered on 23 January 1975, in Case C51/74 *HULST* [1975] ECR p. 79. Special Spanish edition, p. 27.

([22]) Judgment of 30 April 2002 in joined Cases T-195/01 and T-207/01, *Government of Gibraltar* v *Commission* [2002] ECR II-2309, paragraph 109.

([23]) See footnote 22, paragraph 111.

(52) It follows from this case law and legislation that adjustments which do not affect the evaluation of the compatibility of the aid measure cannot affect the substance of the aid either, and therefore do not change the classification of the measure as existing aid. On the other hand, if an alteration affects the substance of a scheme, but not to an extent which requires a new assessment of its other elements, this alteration can be assessed on a stand-alone basis, without reference to the other elements of the scheme. In this case it is only the alteration which is subject to the obligation for notification and review by the Commission.

(53) The three fiscal measures which are introduced or amended by Articles 4, 5 and 6 of Law 8/2009 are severable from the existing scheme for funding RTVE. Although the new sources of financing may affect the legality of the scheme as such, they do not affect the evaluation of the other elements of the aid to RTVE or the effect the aid may have on the market.

(54) The new elements of the aid, namely the new taxes, may create new aid in that they do not fall within any of the situations contemplated by Article 1(b) of Regulation (EC) No 659/1999. They are in fact set up by laws approved after the entry into force of the Treaty, they are not an individual aid measure granted in the context of an authorised aid scheme, they were not authorised on the basis of Article 4(6) of Regulation (EC) No 659/1999, they were not granted 10 years before the Commission's first action and, finally, they apply to sectors that were open to competition when they came into force. Second, even if we admit, as a hypothesis, Spain's argument that they must be regarded as a modification to the existing funding scheme, it appears that the way the additional funding of RTVE is financed constitutes a substantial alteration of the existing funding scheme with regard to the source of its finances. The existing scheme did not contain the specific levies to be collected for the benefit of RTVE, the legality of which may impact on the compatibility of the entire aid.

(55) As was set out in the opening decision, the changes in the financing of RTVE raised doubts on the part of the Commission as to their effect on the overall compatibility of the financing of RTVE with the Treaty and required an additional assessment by the Commission. Therefore these changes needed to be formally notified to the Commission. As set out above, the classification as new aid applies only to the alteration as such. Therefore, the procedure has been opened by the Commission only in order to assess the quality of these changes and their consequences for the compatibility of the aid.

Compatibility of the aid

Definition of RTVE's public service remit and entrustment

(56) The Commission assesses aid to public broadcasters in the form of compensation for the fulfilment of a public service mandate under Article 106(2) of the TFEU, on the basis of the criteria set out in the 2001 Communication on the application of State aid rules to public service broadcasting (the 2001 Broadcasting Communication) ([24]). In accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid and with paragraph 100 of the 2009 Broadcasting Communication, the latter applies in the case of non-notified new aid only if the new aid was granted *after* its publication on 27 October 2009. In the present case, however, the new aid system was introduced with the entry into force of the law on 1 September 2009. Hence, the new financing scheme will be assessed on the basis of the 2001 Communication and of the Commission's subsequent case practice ([25]).

(57) In order for a measure to benefit from the derogation in Article 106(2), it is necessary that all the following conditions be fulfilled:

(a) the service in question must be a service of general economic interest and clearly defined as such by the Member State (definition);

(b) the undertaking in question must be explicitly entrusted by the Member State with the provision of that service (entrustment);

(c) the application of the competition rules of the Treaty (in this case, the ban on State aid) must prevent the performance of the particular tasks entrusted to the undertaking and the exemption from these rules must not affect the development of trade to an extent that would be contrary to the interests of the Union (proportionality) ([26]).

(58) In the specific case of public broadcasting, the above approach has to be adapted in the light of the interpretative provisions of the Amsterdam Protocol, which refers to the 'public service remit as conferred, defined and organised by each Member State' (definition and entrustment) and provides for a derogation from the Treaty rules in the case of 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 … and … does not affect trading

([24]) OJ C 320, 15.11.2001, p. 5.
([25]) This case practice was consolidated in the 2009 Broadcasting Communication. In practice, by complying with the 2009 Broadcasting Communication, Spain will therefore also comply with the Commission's 2001 Broadcasting Communication and the case practice developed on the basis of this Communication.
([26]) See paragraph 29 of the 2001 Broadcasting Communication.

conditions and competition in the Union to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account' (proportionality) ([27]).

(59) The definition of the public service remit by Law 17/2006 has been deemed compatible with Article 106(2) of the TFEU by the Commission in its decision on the financing of RVTE in cases E 8/2005 and NN 8/07. Article 9 of Law 8/2009 affects this definition in so far as it adds further obligations and restrictions on the content of the broadcasting of RTVE. The criterion of an appropriate definition of the public service mandate is therefore still fulfilled. Furthermore, withdrawing RTVE from the TV advertising market may contribute to strengthening the public service mission by making programming less dependent on commercial considerations and the fluctuations of the commercial revenues.

(60) For this reason, the Commission did not express doubts in the opening decision with regard to these aspects of the financing of RTVE.

The choice of funding RTVE

(61) A central feature of the changes in the financing of RTVE is the almost complete discontinuation of its commercial activities, the change from a 'dual funding' system, combining support by public funds and revenues from commercial activities, to 'single funding', where broadcasting is financed exclusively, or almost exclusively, through public funds, in line with the distinction drawn in paragraph 45 of the 2001 Broadcasting Communication. Member States are free to choose whether and how to combine different sources of financing. However, the part of RTVE's income which hitherto originated from commercial activities will not simply be replaced by funding from Spain's general state budget, in line with Article 33 of Law 17/2006. This replacement will also be accompanied by the introduction or amendment of certain taxes for the very purpose of generating the necessary revenues.

(62) The link established between the financing and the revenue from new taxes suggests that the revenue from the taxes appears to be allocated for the financing of the aid to RTVE and to have a direct impact on the amount of the aid. Where a charge specifically intended to finance aid proves to be contrary to other provisions of the Treaty, the Commission cannot declare the aid scheme of which the charge forms part to be compatible with the internal market. Consequently, the method by which an aid measure is financed may render the entire aid scheme incompatible with the internal market. Therefore, as set out in paragraphs 21, 22 and 23 above, it has to be assessed whether the new financing system is in fact hypothecating the aid to the taxes and whether the Commission should therefore include the effects of the new taxes in the State aid analysis.

(63) However, for a tax to be regarded forming an integral part of an aid measure, it must be hypothecated for the financing of the aid, in the sense that the revenue from the tax is necessarily allocated for the financing of the aid and has a direct impact on the amount of the aid ([28]).

(64) These conditions are not fulfilled in the case at hand. As confirmed by Spain, the amount of aid for RTVE is set with regard only to the financing needs of RTVE and the estimated net costs of providing the public broadcasting service. The financing received by RTVE is, in fact and in law, independent from the revenue generated by the taxes, since such financing will depend only on the net costs of the public service obligation. On the one hand, the revenue generated by the taxes which will be allocated to the financing of RTVE cannot exceed the net costs of the public service obligation (any excess going beyond the net cost of public service will be paid back to the general state budget). On the other hand, when the net costs of the public service obligation exceed the revenue generated by the taxes in question, the gap will be filled by contributions from the general state budget. Higher- or lower-than expected revenues from the new taxes will not lead to changes in the projected amounts. Should the revenue from the new tax sources be insufficient to cover the financing gap left by abolishing advertising, the missing funds would be contributed from the general state budget, in accordance with Article 33 of Law 17/2006. Any surplus revenue will be attributed to the general state budget. Therefore the planned overall funding of RTVE's public service mission will not depend on the amount of the specific tax revenues but will in any case be assured by the general State budget.

(65) The fact that the link between the taxes and the purpose for which they are introduced is mentioned in the explanatory memorandum and in the law itself does not alter this conclusion. The wording in the law ('for the purpose of contributing to the financing of RTVE') does not define the quality of the link between the taxes and the aid.

(66) Accordingly, the Commission concludes that the three tax measures described in paragraph 14 are not an integral part of the aid. Their legality has no bearing

([27]) See paragraph 31 of the 2001 Broadcasting Communication.

([28]) Judgment of 22 December 2008 in Case C-333/07 *Regie Networks*, paragraph 99.

on the compatibility of the aid to RTVE. Nor are the observations made by interested parties on their legality of relevance for the State aid assessment. Therefore the infringement proceeding currently open in relation to the tax on electronic communications for an alleged breach of Article 12 of the Authorisation Directive 2002/20/EC does not affect this decision.

Proportionality of the measure

(67) As concerns the proportionality of the compensation so that it covers no more than the net costs of discharging RTVE's public service obligations, the new law provides that any revenue of RTVE in excess of the net costs of the public service plus an additional 10 % reserve would flow back into the general state budget. A 10 % surplus may be kept in a reserve fund, in order to cover a possible undercompensation in previous years or exceptional costs, for up to 4 years. This mechanism to avoid undue overcompensation is in line with the Commission's case practice ([29]).

(68) To ensure that the aid is proportionate, Member States must also install an appropriate mechanism to ensure a regular and effective control of the use of public funding for the public service remit ([30]) and a guarantee that the annual State financing is limited to the net cost of the public service obligation ([31]). Spain retains in place its system of external control introduced by Law 17/2006, as described above and as approved by the Commission in decision E 8/2005, which allows the net costs of public service broadcasting to be determined.

(69) However, given that the abolition of advertising may impact on the costs of the broadcaster by making its programming less dependent on commercial considerations, in order to rule out the possibility of overcompensation the Commission, in the opening decision, invited Spain and other interested parties to comment on the financing mechanism.

(70) Interested parties expressed concerns that an overcompensation of RTVE would be likely. The budgetary planning for RTVE of EUR 1 200 million per year would not be based on a proper calculation of the net costs of the public service. It would not differentiate between commercial and public service activities and would not consider cost savings through abolishing advertising because programmes no longer need to attract a large audience and may be produced more cheaply. Furthermore, the full compensation for the loss of advertising income would be calculated on the basis of previous years while the economic crisis would have led to lower commercial revenues in 2010 and consequently to lower overall revenues for RTVE. It would not be fair if, with the abolition of dual financing, RTVE were to obtain a guaranteed income, independent from the varying commercial income. They also expressed a concern regarding budgetary control.

(71) 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 the remaining commercial income (estimated as 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.

(72) Regarding budgetary control, Spain pointed to the existing control mechanisms already established by Law 17/2006, as described in paragraph 38 above. To assure that the State aid does not exceed the net costs of the public service mission, an effective budgetary ex post control is assured, according to Article 37 of Law 17/2006, by internal auditing, a public review by the Government Audit Office and external auditing by a private auditing firm. Furthermore, pursuant to Articles 39 and 40 of this Law, the Parliament and the audiovisual authority supervise the fulfilment of the public service mission by RTVE and its annual accounts. Finally, RTVE is subject to review by the Court of Auditors. The comments received from interested parties do not give any reason to suppose that this system is not being properly applied.

([29]) See, for instance, paragraph 281 of Decision E 3/2005 ('a margin of 10 %') and paragraph 147 of Commission Decision C 2/04 of 22 June 2006 ('10 % of the total budget'). This case practice was consolidated and clarified in paragraphs 73 and 74 of the 2009 Broadcasting Communication.

([30]) The 2001 Broadcasting Communication, paragraph 41.

([31]) See Decisions E 3/2005, paragraph 282, and E 4/2005, paragraph 112.

(73) The Commission considers that there is no indication that the estimated annual compensation for RTVE's public service obligation will exceed what can reasonably be expected to be the costs of this service or that the compensation would eventually go beyond the net costs of the public service.

Diversification of audiovisual services

(74) Moreover, in the opening decision the Commission asked Spain whether it had an adequate procedural framework for assessing ex ante whether the new audiovisual services of the public broadcaster RTVE comply with the material conditions of the Amsterdam Protocol (the so called ex ante control) ([32]). The information submitted by Spain so far did not allow the Commission to examine whether Spain already has such a mechanism. The Commission agrees with Spain's contention that in principle this element of the financing of RTVE was the subject of the decisions of 2005 and 2007, which concerned the entire system of financing RTVE. The Commission furthermore agrees that the system has not been affected by the introduction of the new levies which gave rise to the present proceeding.

(75) Nevertheless, according to the information submitted by Spain, Article 41(3) of Law 7/2010 ([33]) established such a procedure and entrusted the independent Spanish supervisory and regulatory authority for public broadcasting, the Consejo Estatal de Medios Audiovisuales, with the execution of this control, consisting of a public consultation of stakeholders, publication of the results of the consultation, and the evaluation of the overall impact of each new service on the market. However, this law does not contain a definition of what constitutes a significant new service. Member States should establish the relevant criteria ([34]). But Spain indicated that it intends to sign a programme contract (contrato-programa) with RTVE by 1 November 2010 at the latest which will contain such a definition. According to the draft of this programme contract, a significant new service will be taken to mean a new service offer clearly differentiated from the services already in place, which can be classified as the relevant product market, with the ability to have an effect on the market, in particular in terms of the impact on demand.

(76) Spain has therefore fulfilled its obligation to introduce ex ante control, and the Commission takes note that by November 2010 it also intends to introduce a binding definition of what constitutes a significant new service. The Commission also notes that this mechanism had not been established before 2010.

VI. **CONCLUSION**

(77) The Commission finds that Spain has unlawfully implemented the reform of the financing of the public broadcaster RVTE in breach of Article 108(3) of the Treaty on the Functioning of the European Union. However, the Commission concludes that the taxes collected are not hypothecated for the financing of the aid for RTVE and do not have an impact on the compatibility of the aid with the Treaty. Furthermore, Spain has in place safeguards to avoid an overcompensation of RTVE. Finally, the Commission notes that Spain has introduced a procedure for an ex ante control for the introduction of significant new services within the public service remit. Therefore the aid to the public service broadcaster RTVE remains compatible with the Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The financing of the public service broadcaster Corporación de Radio y Televisión Española (RVTE), modified by Spain by Law 8/2009 on the financing of RTVE, is compatible with the internal market within the meaning of Article 106(2) of the Treaty on the Functioning of the European Union.

Article 2

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 20 July 2010.

For the Commission
Joaquín ALMUNIA
Vice-President

([32]) See Decisions E 3/2005, paragraphs 370 and 372; E 8/2006, paragraph 230 and E 4/2005, paragraph 121. This case practice was adopted based on the 2001 Broadcasting Communication and further clarified and consolidated in paragraphs 84-89 of the 2009 Broadcasting Communication.
([33]) See footnote 13 above.
([34]) Laid down in paragraph 85 of the 2009 Broadcasting Communication.

JUDGMENT OF THE COURT (Grand Chamber)

22 December 2008 (*)

(State aid – Aid scheme to support local radio stations – Financed by a parafiscal charge on advertising companies – Favourable decision by the Commission at the conclusion of the preliminary stage of the review procedure under Article 93(3) of the EC Treaty (now Article 88(3) EC) – Aid that may be compatible with the common market – Article 92(3) of the EC Treaty (now, after amendment, Article 87(3) EC) – Decision challenged on the ground that it is unlawful – Obligation to state the reasons on which the decision is based – Assessment of the facts – Whether the parafiscal charge is compatible with the EC Treaty)

In Case C-333/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Cour administrative d'appel de Lyon (France), made by decision of 12 July 2007, received at the Court on 17 July 2007, in the proceedings

Société Régie Networks

v

Direction de contrôle fiscal Rhône-Alpes Bourgogne,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans (Rapporteur), K. Lenaerts, A. Ó Caoimh and J.-C. Bonichot, Presidents of Chambers, K. Schiemann, P. Kūris, E. Juhász, L. Bay Larsen and P. Lindh, Judges,

Advocate General: J. Kokott,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 30 April 2008,

after considering the observations submitted on behalf of:

– Régie Networks, by B. Geneste and C. Medina, avocats,

– the French Government, by G. de Bergues and B. Messmer, acting as Agents,

– the Commission of the European Communities, by J.-P. Keppenne and B. Martenczuk, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 June 2008,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the validity of the decision of the Commission of the European Communities of 10 November 1997 not to raise any objections to the new version of an aid scheme to support local radio stations (State aid No N 679/97 – France) ('the contested decision'), a brief notice of which was published in the *Official Journal of the European Communities* (OJ 1999 C 120, p. 2).

2 The reference was made in the course of an action brought by Régie Networks, a company constituted under French law, for reimbursement of a sum which it paid by way of a parafiscal charge levied on advertisements broadcast on sound radio and television for 2001.

Legal context

3 Article 80 of Law No 86-1067 of 30 September 1986 on freedom of communication (JORF of 1 October 1986, p. 11755), as amended by Article 25 of Law No 89-25 of 17 January 1989 (JORF of 18 January 1989, p. 728) and Article 27 of Law No 90-1170 of 29 December 1990 (JORF of 30 December 1990, p. 16439), provides as follows:

'Sound radio broadcasting services in respect of which the commercial revenue deriving from broadcasts of brand or sponsorship advertising is less than 20% of their total turnover shall be granted aid in accordance with the procedure laid down by decree by the Conseil d'État.

To fund that aid, a charge shall be levied on the revenue from advertisements broadcast on sound radio and television.

Revenue from sound radio broadcasting services in connection with advertisements to support collective or public interest initiatives shall not be taken into account for the purpose of determining the threshold laid down in the first paragraph of this article.'

4 According to Article 1 of Decree No 97-1263 of 29 December 1997 creating a parafiscal charge for the benefit of a fund to support radio broadcasting (JORF of 30 September 1997, p. 19194):

'With effect from 1 January 1998, a parafiscal charge on advertisements broadcast on sound radio and television [('the charge on advertising companies')] shall be introduced for a period of five years to fund an aid scheme for the benefit of those holding a licence to provide sound radio broadcasting services in respect of which

the commercial revenue deriving from broadcasts of brand or sponsorship advertising is less than 20% of the total turnover.

The objective of this charge is to promote radio broadcasting.'

5 Article 2 of that decree provides as follows:

'The charge shall be levied on the sums, exclusive of agency fees and value added tax, paid by advertisers for the broadcasting of their advertisements to French territory.

Those liable to pay the tax are the persons responsible for marketing such advertisements.

The rate of tax shall be determined in a joint order by the Ministers responsible for the Budget and Communications and shall be paid in stages on the basis of the quarterly revenue of the companies liable for the charge and the following upper limits shall apply:

…'

6 According to Article 3 of the decree, the net revenue from the charge on advertising companies is paid into the Fonds de soutien à l'expression radiophonique (support fund for promoting radio broadcasting; 'FSER'), which is a separate account kept in the accounts of the Institut national de l'audiovisuel (National Audiovisual Institute).

7 Article 4 of the decree provides that that charge is levied, assessed and collected for the FSER by the Directorate-General for Taxation in accordance with the rules applicable to value added tax and the same guarantees and penalties apply.

8 Articles 7 to 20 of Decree No 97-1263 lay down the rules governing aid paid by the Institut national de l'audiovisuel that is financed by the net revenue from the charge on advertising companies paid into the FSER.

9 The persons eligible for such aid are the holders of a licence to provide sound radio broadcasting services referred to in Article 1 of that decree ('local radio stations').

10 According to Article 7 of the decree, the aid is allocated from the available funds by a committee whose composition and rules of procedure are governed by that provision and by Articles 8 to 11 of the decree ('the FSER Committee').

11 Decree No 97-1263 makes provision for three types of aid ('radio broadcasting aid').

12 The first of these is a setting-up grant, for which the conditions of allocation are laid down in Articles 12 and 13 of that decree. That grant, which is limited to FRF

100 000, is allocated to local radio stations newly licensed on the basis of documentation submitted by those stations.

13 The next form of aid is equipment aid, the detailed rules governing this being laid down in Article 14 of the decree. Such aid, which is granted to local radio stations on the basis of documentation submitted by them, cannot be allocated less than five years after a setting-up grant has been provided and may be granted only once every five years. Equipment aid must not exceed 50% of the amount invested and is also subject to a limit of FRF 100 000.

14 The last form of aid is an annual operating grant and the conditions under which it may be granted are laid down in Articles 16 and 17 of the decree.

15 The first paragraph of Article 17 of Decree No 97-1263 provides as follows:

'The amount of the operating grant shall be determined in accordance with a scale to be drawn up by the [FSER] Committee, taking account of the revenue from normal current operations of the radio station in question before deducting the advertising marketing costs. The scale shall be published.'

16 The second paragraph of that provision provides that that amount may be increased by up to 60% depending on the steps taken to diversify the financial resources directly linked to radio broadcasting, action taken to provide professional training for the staff of the radio station in question, action taken with regard to education and culture, participation in collective programming measures and endeavours in the fields of social communication at local level and integration.

17 The radio broadcasting aid scheme established by Decree No 97-1263, which is applicable to the action in the main proceedings, followed the schemes introduced with effect from 1 January 1983 by various earlier decrees, initially for a period of two years and subsequently for periods of five years.

18 The radio broadcasting aid scheme provided for in Article 302a KD of the Code général des impôts (French General Tax Code), introduced by Article 47 of the Finance Law for 2003, Law No 2002-1575 of 30 December 2002 (JORF of 31 December 2002, p. 22025), was itself the successor to the scheme introduced by Decree No 97-1263 with effect from 1 January 2003 for an indefinite period.

19 That new scheme was amended, with effect from 1 July 2003, by Article 22 of Law No 2003-709 of 1 August 2003 on sponsorship, associations and foundations (JORF of 2 August 2003, p. 13277).

20 The second paragraph of Article 302a KD of the General Tax Code, as amended by that law, is worded as follows:

‘The charge shall be levied on the sums, exclusive of agency fees and value added tax, paid by advertisers to advertising companies for the broadcasting of their advertisements from French territory.

…’

The dispute in the main proceedings and the question referred for a preliminary ruling

The Commission’s decisions on the successive radio broadcasting aid schemes

21 In its decision of 1 March 1990 relating to aid measure No N 19/90, the Commission informed the French authorities that it did not intend to raise any objections to the setting-up of the radio broadcasting aid scheme which those authorities had notified to the Commission in accordance with Article 93(3) of the EEC Treaty (which became Article 93(3) of the EC Treaty and then Article 88(3) EC).

22 Nor did the Commission raise any objections in its decision of 16 September 1992 relating to aid measure No N 359/92 with regard to a draft decree amending the radio broadcasting aid scheme which had been the subject of its earlier decision and had been notified to it by the French authorities in accordance with Article 93(3) of the EEC Treaty.

23 In that second decision, the Commission took the view that, in the light in particular of the actual characteristics of the beneficiaries of that support (small radio stations with local audiences), intra-Community competition and trade should not be affected to an extent that was contrary to the common interest and, accordingly, a derogation from the prohibition on aid could be justified on the ground that such a scheme continued to pursue public interest objectives.

24 Next, in the contested decision, the Commission also informed the French authorities that it did not intend to raise any objections to the draft decree – subsequently adopted as Decree No 97-1263 – intended to amend the radio broadcasting aid scheme which had previously been accepted and notified to it by those authorities in accordance with Article 93(3) of the EC Treaty.

25 In that decision, the Commission considered that, in view of the fact that the budgetary resources for the aid in question had not increased and the beneficiaries of that aid were radio stations with local audiences, intra-Community trade should not be affected to an extent that was contrary to the common interest and, accordingly, a derogation from the prohibition on aid could be justified on the ground that such a scheme continued to pursue public interest objectives.

26 Finally, by its decision of 28 July 2003 relating to aid measure No NN 42/03 (formerly N 725/02), the Commission did not raise any objections to the draft law intended to amend the radio broadcasting aid scheme which had previously been approved, in its various forms, by the three decisions referred to above, which the

French authorities notified to it in accordance with Article 88(3) EC. The scheme thus amended was then covered by the second paragraph of Article 302a KD of the General Tax Code, as amended by Law No 2003-709.

27 In that decision, the Commission stated that the charge on advertising companies that finances the aid scheme concerned is paid by the advertising companies, not by the individual advertisers, and the charge did not appear on the latter's invoices.

28 The Commission also stated that only advertising companies established in French territory were liable for the charge and, therefore, no charge could be levied on advertisements broadcast to French territory from abroad.

29 Moreover, the Commission took account of the fact that, conversely, advertising companies established in French territory broadcasting exclusively abroad are liable to pay the charge, which is therefore consistent with Community rules governing parafiscal charges intended to finance aid schemes.

30 Furthermore, the Commission considered in particular that, given that the beneficiaries of the aid scheme in question are non-commercial radio stations with purely local audiences, that scheme pursued a public interest objective by protecting the plurality of the media at local level and any effect it may have on intra-Community trade is negligible.

31 The Commission accordingly took the view that that scheme, which facilitates the development of community radio broadcasting and does not affect intra-Community trade to an extent that is contrary to the Community interest, constituted aid that is compatible with the common market by virtue of Article 87(3)(c) EC.

The facts of the case

32 The facts of the case, as disclosed by the order for reference, may be summarised as follows.

33 Régie Networks, the company which sells advertising space for the NRJ Group's local radio stations, paid EUR 152 524 by way of charge on advertising companies for 2001.

34 It then claimed reimbursement of that sum from the local tax authorities. Since those authorities failed to give a decision on that claim within the statutory time-limit and the claim was thus rejected by implication, it instigated proceedings before the Tribunal administratif de Lyon (Administrative Court, Lyons).

35 In a judgment of 25 April 2006, that court rejected Régie Networks' application. That company then appealed against that decision before the Cour administrative d'appel de Lyon (Administrative Court of Appeal, Lyons).

36 Before the Cour administrative d'appel de Lyon, Régie Networks submitted, first of all, that the contested decision was invalid on the ground that the statement of reasons was inadequate.

37 It contended that no reason is given in that decision to justify the view that the aid scheme in question does in fact fall within one of the categories of exception provided for in the EC Treaty. Moreover, in that decision, the Commission failed to examine whether the method by which that scheme was financed, namely by means of the charge on advertising companies, is compatible with the Treaty and to give express reasons for its assessment of that issue, whereas it is apparent from the Court's case-law that such an examination is essential for the purpose of determining whether aid is compatible. Régie Networks referred to the judgment in Joined Cases C-261/01 and C-262/01 *van Calster and Others* [2003] ECR I-12249 in that regard.

38 Secondly, Régie Networks maintained that the contested decision is vitiated by an error of law. The charge on advertising companies is incompatible with the common market on the ground – which was moreover taken into account by the Commission in its decision of 28 July 2003 referred to at paragraphs 26 to 31 above – that, according to the established case-law of the Court, imported goods and services must be exempt from all fiscal charges designed to finance an aid scheme which benefits only national undertakings.

39 Thirdly, Régie Networks argued that the contested decision is vitiated by an error in the assessment of the facts, since the Commission stated, contrary to the facts, that the budgetary resources for the aid scheme in question had not increased.

40 Régie Networks concluded that, if the Court of Justice were to find that the contested decision is invalid, the aid scheme whose implementation was authorised by that decision is unlawful ab initio and the effect of that unlawfulness is to make the financing of the scheme unlawful.

41 The Cour administrative d'appel de Lyon considers that the three pleas in law relied upon by Régie Networks raise serious difficulties which call into question the validity of the contested decision.

42 In those circumstances, the Cour administrative d'appel de Lyon decided to stay the proceedings and to request a preliminary ruling from the Court of Justice on the following question:

'Is the [contested decision] valid in respect of the statement of reasons, the assessment made as to the compatibility with the EC Treaty of the funding of the radio broadcasting aid scheme for the period 1998 to2002 and in respect of the contention that there was no increase in the budgetary resources for the aid scheme at issue?'

The question

Admissibility

43 The Commission takes the view that there is no need for the Court to rule on the referring court's question as to the validity of the contested decision, since that question bears no relation to the purpose of the main action, which concerns the legality of the charge on advertising companies.

44 According to the Commission, that charge does not fall within the scope of the Treaty provisions on State aid. Since there is no connection between the amount of grants paid out under the radio broadcasting aid scheme and the revenue generated by the charge which finances such aid, in so far as the criteria for determining the amount of aid are unconnected to the level of revenue from the charge, it does not form an integral part of that scheme. The Commission refers in that regard to paragraph 40 of 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.

45 That objection cannot be accepted.

46 According to settled case-law, questions on the interpretation of Community law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, to that effect, Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233, paragraph 22 and the case-law cited).

47 The Court may decide, in particular, not to give a preliminary ruling determining the validity of a Community act where it is quite obvious that that determination, requested by the national court, bears no relation to the actual facts of the main action or its purpose (see, inter alia, Case C-222/04 *Cassa di Risparmio di Firenzeand Others* [2006] ECR I-289, paragraph 75 and the case-law cited).

48 In order to determine whether the present reference for a preliminary ruling is admissible, it is sufficient to state that the possibility cannot be ruled out a priori that there is a connection between the question referred for a preliminary ruling on the validity of the contested decision, adopted in the context of the Treaty rules on State aid, and the dispute in the main proceedings, the subject of which is Régie Networks' application for reimbursement of sums paid for 2001 by way of the charge on advertising companies and which requires an assessment of whether that charge is lawful.

49 At the very least, it is not obvious that that charge does not form an integral part of the radio broadcasting aid scheme.

50 At this stage in the analysis of the question referred for a preliminary ruling, it is sufficient to state that the contrary would appear to be the case, since the national legislation in question expressly provides that the purpose of the revenue generated by the charge on advertising companies is to finance the FSER, which is used to fund that aid.

51 If it appears that it can be argued, prima facie, that that charge is hypothecated to the aid which it was designed to fund, it cannot be ruled out that a finding that the contested decision is invalid may stem from the fact that the charge is unlawful, which may result in an obligation to reimburse the sums paid by way of that charge.

52 In those circumstances, it is not apparent, or at the very least not obviously so, that the determination sought as to the validity of the contested decision bears no relation to the actual facts of the main action or its purpose.

53 The Commission also contends that the question referred for a preliminary ruling is inadmissible on the ground that it does not necessarily follow that the effect of any judgment finding that the contested decision is invalid is that the charge concerned is unlawful and must be reimbursed.

54 According to the Commission, in view of the Commission's sole power to determine whether aid is compatible, the national court should order reimbursement of sums paid by way of a charge financing aid authorised by the Commission only if the invalidity established is such that, even if a new decision were adopted, that aid could only be declared incompatible with the common market.

55 That objection must also be rejected.

56 Admittedly, if, following a preliminary ruling declaring that the contested decision is invalid, the Commission adopts a new decision, the outcome of that decision will not necessarily be that the charge on advertising companies must be regarded as unlawful, since that new decision may once again be favourable.

57 However, it does not follow from that fact alone that the determination sought as to the validity of the contested decision clearly bears no relation to the purpose of the case in the main proceedings and that, as a consequence, the national court's assessment that the reference for a preliminary ruling is relevant and necessary could be called into question by the Court.

58 On the contrary, if it were to be established that the contested decision must in fact be declared invalid, an answer from the Court to that effect could be useful and relevant to the decision to be given in the main proceedings, since it would oblige the Commission to re-examine the aid scheme at issue in those proceedings.

59 Moreover, the possibility cannot be excluded, primarily in so far as some of Régie Network's complaints relate to aspects of that scheme which the Commission has not yet examined and which would render it incompatible with the common market, that as a result of that re-examination the Commission may come to the conclusion that the scheme must in fact be declared incompatible with the common market, which could have the effect, as explained at paragraph 51 above, of making the charge on advertising companies unlawful, thus giving rise to an obligation to reimburse the sums paid by way of that charge.

60 The presumption of relevance enjoyed by references for a preliminary ruling has not therefore been rebutted by the objections raised by the Commission (see by analogy, inter alia, *van der Weerd and Others*, paragraphs 22 and 23).

61 It follows that the question referred for a preliminary ruling is admissible.

Substance

Whether the contested decision is valid in the light of the obligation to state adequate reasons

62 By its question, in so far as it seeks to ascertain whether the contested decision is valid as far as the statement of reasons is concerned, the Cour administrative d'appel de Lyon asks the Court whether that decision must be regarded as invalid on the ground of insufficient reasoning, since, first, no reason is given in that decision to justify the view that the aid scheme in question does in fact fall within one of the categories of exception provided for in Article 92(3) of the EC Treaty and, second, in that decision, the Commission failed to consider whether the method by which that aid scheme was financed, namely by means of the charge on advertising companies, is compatible with the Treaty and to give express reasons for its assessment in that regard.

63 According to settled case-law, the statement of reasons required by Article 190 of the EC Treaty (now Article 253 EC) must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent Community 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, 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 190 of the Treaty 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, inter alia, Case C-390/06 *Nuova Agricast* [2008] ECR I-0000, paragraph 79, and Joined Cases C-341/06 P and C-342/06 P *Chronopost and La Poste* v *UFEX and Others* [2008] ECR I-0000, paragraph 88 and the case-law cited).

64 As regards, first of all, the measure at issue, the contested decision was adopted at the end of the preliminary stage of the procedure for reviewing aid under Article 93(3) of the EC Treaty, which is intended merely to allow the Commission to form a prima facie opinion on the partial or complete compatibility of the aid in question without opening the formal investigation procedure under Article 93(2) of the EC Treaty, which is designed to enable the Commission to be fully informed of all the facts pertaining to that aid (see to that effect, inter alia, *Nuova Agricast*, paragraph 57 and the case-law cited).

65 Such a decision, which is taken within a short period of time, must simply set out the reasons for which the Commission takes the view that it is not faced with serious difficulties in assessing the compatibility of the aid at issue with the common market (Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 48).

66 Secondly, as regards the context in which the contested decision was adopted, as is apparent from paragraphs 21 to 23 above, that decision was taken following two other favourable decisions on earlier radio broadcasting aid schemes which were essentially the same as that in issue in the contested decision and had also been previously notified by the French authorities to the Commission. The contested decision also refers expressly to the Commission's examination and acceptance of the aid scheme preceding the scheme which was the subject of that decision, which it was intended to replace.

67 That fact also justified the statement of reasons in the contested decision being succinct.

68 It is in the light of those considerations that it is necessary to examine the specific complaints made against that decision alleging infringement of the obligation to state adequate reasons.

69 The reasons given in that decision are that 'in view of the fact that the relevant budgetary resources have not increased and the beneficiaries of that aid are radio stations with local audiences, intra-Community trade should not be affected to an extent that is contrary to the common interest and, accordingly, a derogation from the prohibition on aid can be justified on the ground that such a scheme continues to pursue public interest objectives'.

70 While, admittedly, that statement of reasons is succinct, it nevertheless discloses in a clear and unequivocal fashion the reasons for which the Commission considered that it was not faced with serious difficulties in assessing the compatibility of the aid scheme at issue with the common market. It follows from this that the Commission based its conclusion essentially on the ground that intra-Community trade should not be affected by that scheme to an extent that was contrary to the common interest.

71 In the light of the case-law cited at paragraphs 63 to 65 above, such a statement of reasons must, in view of the nature and context of the measure in which it

appears, be regarded as sufficient for the purpose of satisfying the requirement to state adequate reasons laid down in Article 190 of the EC Treaty, the question of whether the reasoning is well founded being a separate matter.

72 While it would have been preferable for the Commission in the contested decision expressly to have identified which of the categories of exception set out in Article 92(3) of the EC Treaty applied in this case and to have described the charge funding the radio broadcasting aid scheme – as it did in its subsequent decision of 23 July 2003 which amended that scheme – the contested decision cannot be declared unlawful pursuant to Article 190 of the EC Treaty on the ground that no specific reasons are given which address those points.

73 With regard in particular to the complaint alleging that, in the statement of reasons for the contested decision, no indication is given of the category of exception in Article 92(3) of the EC Treaty which the aid scheme in question falls within, it is implicit in the statements that 'the beneficiaries of that aid are radio stations with local audiences' and 'intra-Community trade should not be affected to an extent that is contrary to the common interest' that the category of exception intended was that in Article 92(3)(c) of the EC Treaty, namely aid to facilitate the development of certain economic activities, which, in this instance, as the Commission specified in its decision of 23 July 2003, is community radio broadcasting.

74 Finally, as regards the fact that the contested decision does not expressly address the compatibility with the Treaty of the method by which the scheme was financed, namely by means of the charge on advertising companies, the allegation of an infringement of Article 190 of the EC Treaty must in any event fail since, according to the Commission, there was no need to consider that point because that charge did not form an integral part of the aid scheme in question.

75 The merits of that argument cannot be assessed in the context of the examination of the complaint relating to the obligation to state adequate reasons. That assessment will therefore be carried out in due course, in connection with the response to that part of the question that raises an allegation of an error of law in so far as the contested decision failed to state that the charge on advertising companies is incompatible with the common market.

76 As regards the obligation to state reasons, it must be concluded that the examination of the question referred has disclosed nothing capable of affecting the validity of the contested decision.

The alleged error in the assessment of the facts relating to changes in the budgetary resources allocated to the radio broadcasting aid scheme

77 By its question, in so far as it seeks to ascertain whether the contested decision is valid as far as concerns the contention that the budgetary resources allocated to finance the aid scheme in question were not increased, the Cour administrative d'appel de Lyon asks the Court whether that decision must be regarded as invalid

because the statement of reasons contains a factual error in that it states that the budgetary resources allocated to the aid concerned were not increased, whereas those resources were in fact increased.

78 According to case-law, in the application of Article 92(3) of the EC Treaty, the Commission enjoys wide discretion, the exercise of which involves complex economic and social assessments which must be made in a Community context. In that context, judicial review of the manner in which that discretion is exercised is confined to establishing that the rules of procedure and the rules relating to the duty to give reasons have been complied with, and to verifying that the facts relied on are accurate and that there has been no error of law, manifest error in the assessment of the facts or misuse of powers (see, inter alia, Joined Cases C-75/05 P and C-80/05 P *Germany and Others* v *Kronofrance* [2008] ECR I-0000, paragraph 59 and the case-law cited).

79 In the present case, at the time when it was made, the Commission's statement that the budgetary resources allocated to the aid in question were not increased constituted an assessment of the future effects of the radio broadcasting aid scheme as regards, in particular, the revenue from the charge on advertising companies which was intended to finance the FSER, which was used to fund that aid.

80 However, it is irrelevant that, subsequently, the resources allocated to that fund were actually increased to a certain extent.

81 The legality of a decision concerning State aid is to be assessed in the light of the information available to the Commission when the decision was adopted, especially where the decision in question is a decision not to raise objections to an aid scheme adopted at the end of the preliminary stage of the procedure for reviewing aid under Article 93(3) of the EC Treaty, such as the contested decision (see, to that effect, *Nuova Agricast*, paragraphs 54 and 55).

82 Since, in the contested decision, the Commission had cause to assess the future effects of an aid scheme at a time when such effects could not be accurately foreseen, that decision can be declared unlawful – on the ground of its assessment that the budgetary resources for the aid concerned would not be increased – only if that decision was manifestly incorrect in the light of the information available to the Commission when that decision was adopted.

83 While it is true, as regards television advertising, that Article 2 of the draft decree which became Decree No 97-1263 provided that the ceiling on the charge rates could be raised, the Court points out that, at the time when the aid scheme was notified to the Commission, those rates had yet to be determined in accordance with the third paragraph of Article 2 of that draft decree.

84 Moreover, it is not disputed that, at that time, the advertising revenue which formed the basis of assessment of the charge on advertising companies was also still unknown and could therefore only be estimated.

85 In the light of the existence of such variables, which constituted elements of uncertainty to be assessed by the Commission at the same time as taking into account, in particular, the evidence contained in the notification of the aid scheme concerned and any information communicated by the national authorities, it cannot be found that there was a manifest error in the assessment of the information in question.

86 As regards the alleged error of assessment of the facts, it must be concluded from the above that the examination of the question referred has disclosed nothing capable of affecting the validity of the contested decision.

The alleged error of law regarding the compatibility with the Treaty of the charge on advertising companies

87 By its question, in so far as it seeks to ascertain whether the contested decision is valid as far as concerns the assessment made of the compatibility with the Treaty of the radio broadcasting aid scheme set up for the period between 1998 and 2002, the Cour administrative d'appel de Lyon seeks to ascertain whether that decision should be declared invalid on account of the fact that the charge on advertising companies was incompatible with the common market in so far as that charge was also levied on radio and television advertisements broadcast to France from abroad, whereas the revenue from that charge finances an aid scheme from which only local radio stations established in France can benefit.

88 While, as pointed out at paragraph 78 above, the Commission enjoys wide discretion in the application of Article 92(3) of the EC Treaty, that power is none the less subject to compliance with certain limitations which the Community judicature is required to review.

89 Thus, the Court has held that the method by which aid is financed may render the entire aid scheme which it is intended to finance incompatible with the common market. Therefore, the aid cannot be considered separately from the effects of its method of financing. Quite to the contrary, consideration of an aid measure by the Commission must necessarily also take into account the method of financing the aid in a case where that method forms an integral part of the measure (see to that effect, inter alia, *vanCalster and Others*, paragraph 49, and Case C-345/02 *Pearle and Others* [2004] ECR I-7139, paragraph 29).

90 In such a case, the notification of the aid provided for in Article 93(3) of the EC Treaty must also cover the method by which it is financed, so that the Commission may consider it on the basis of all the facts. If this requirement is not satisfied, it is possible that the Commission may declare that an aid measure is compatible, when, if the Commission had been aware of its method of financing, it could not have been so declared (*vanCalster and Others*, paragraph 50).

91 However, the Commission submitted at the hearing that it must be assumed that a charge financing an aid measure need only be notified by a Member State and, therefore, considered by the Commission, if, on an initial assessment that must be

carried out by the Member State concerned, those liable to pay that charge and the beneficiaries of the aid in question are in competition with each other. Where there is no such relationship of competition, there is no Community interest in a Member State notifying or the Commission examining a charge financing an aid measure.

92 That argument must be rejected.

93 While the question whether there is a relationship of competition between the persons liable to pay a charge and the recipients of the aid which that charge is used to fund may be an important factor in the context of the Commission's substantive examination as to whether aid is compatible with the common market, it cannot be an additional criterion determining the scope of the obligation to notify aid laid down in Article 93(3) of the EC Treaty.

94 Where a charge constitutes the means by which an aid scheme such as that at issue in the main proceedings is financed, it is clearly in the Community interest that the Member State notifies that scheme, including the method of financing which forms an integral part of it, so that the Commission may have available to it all the information necessary to assess the compatibility of that measure with the common market, an assessment which falls within its exclusive competence, subject to review by the Community judicature (see to that effect, inter alia, Case C-119/05 *Lucchini* [2007] ECR I-6199, paragraph 52 and the case-law cited).

95 The effectiveness of that exclusive power would be at risk of being compromised if, in order to exercise it, the Commission had to rely on each Member State carrying out a prior unilateral assessment as to whether the persons liable to pay a charge and the recipients of aid financed by the charge were in competition with each other.

96 That applies all the more so in a context involving an aid scheme and a charge such as those at issue in the main proceedings, since that scheme concerns aid whose recipients operate in a market which cannot be regarded as being clearly distinct from that in which the persons liable to pay the charge also operate.

97 The answer to the question whether there is a relationship of competition between those aid recipients and parties liable to pay the charge may, in many cases, be open to discussion, as demonstrated by the divergence of opinion expressed in the course of these preliminary reference proceedings, both in the written observations and at the oral hearing. In order to provide such an answer, it is necessary to conduct a detailed investigation of the characteristics of the markets in question as part of the substantive review of the aid which the Commission alone can carry out, subject to review by the Community judicature.

98 It is necessary to determine whether the charge on advertising companies should in any event have been taken into account by the Commission in its review of the aid scheme concerned on account of the fact that, in the light of the case-law

referred to at paragraph 89 above, it should be considered to form an integral part of the radio broadcasting aid scheme which that charge was used to finance.

99 For a tax to be regarded as forming an integral part of an aid measure, it must be hypothecated to the aid under the relevant national rules, in the sense that the revenue from the charge is necessarily allocated for 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 common market (see, inter alia, Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* [2006] ECR I-5293, paragraph 46 and the case-law cited).

100 In the circumstances of the present case, it is apparent from Articles 3 and 6 of Decree No 97-1263 that the net revenue from the charge on advertising companies finances the FSER, from which the FSER Committee pays the radio broadcasting aid. That charge is levied specifically and solely for the purpose of financing the aid at issue (see, by analogy, *van Calster and Others*, paragraph 55).

101 That close link between the charge on advertising companies and the aid which it is used to finance is also clearly apparent from both the title of Decree No 97-1263 – 'creating a parafiscal charge for the benefit of funds to support radio broadcasting' – and the titles of the two parts of that decree, thus reflecting its structure, namely '[FSER] resources' and 'Allocation of aid' respectively.

102 The charge on advertising companies is also of a fundamentally different nature from that of the charges financing the aid measures at issue in certain judgments of the Court relied on by the Commission, in which the Court found that the charge was not hypothecated to the aid measure in question under the relevant national rules (Case C-175/02 *Pape* [2005] ECR I-127, and *Distribution Casino France and Others*).

103 In those cases, that conclusion was based on the finding that, under the relevant national rules, the revenue from the charge in question did not have a direct impact on the amount of the aid.

104 In the present case, the net revenue from the charge on advertising companies is used wholly and exclusively to finance radio broadcasting aid and therefore has a direct impact on the amount of that aid. While it is true that the aid is allocated by the FSER Committee, it is not disputed that that body does not have the power to allocate the funds available for purposes other than that of such aid.

105 Thus, Article 7 of Decree No 97-1263 provides that the aid is to be allocated from the available funds by the FSER Committee. Nor is it disputed that the FSER's resources, other than those generated by the revenue from the charge on advertising companies, are negligible.

106 While it is true that the setting-up grant and equipment aid are subject to limits and calculated according to specific assessment criteria, if their amount is below

those ceilings it must be determined essentially within the limits of the anticipated revenue from the charge on advertising companies.

107 That is even more apparent in the case of the annual operating grant, which is clearly the most important type of aid for radio broadcasting, since, for example, it alone accounts for more than 96% of the total aid paid in 2003, as Régie Networks stated at the hearing without being contradicted on that point.

108 According to Article 17 of Decree No 97-1263, the amount of aid is determined in accordance with a scale drawn up by the FSER Committee, which takes account of the revenue from the current normal operations of the radio station in question before deducting the advertising marketing costs.

109 At the hearing, Régie Networks explained, again without being contradicted on this point, that that scale is fixed on the basis of the FSER's resources for the previous year, the projected amount of revenue from the charge on advertising companies set out in the initial Finance Law and forecast trends in the advertising market.

110 Lastly, while the possible increase in the annual operating grant in accordance with the second paragraph of Article 17 of Decree No 97-1263 cannot be more than 60%, the annual amount of that grant is also dependent, subject to that limitation, on the funds available and, therefore, essentially on the revenue or the projected amount of revenue from the charge on advertising companies.

111 In those circumstances, the revenue generated by the charge has an impact on the amount of radio broadcasting aid paid. In fact, the grant of that aid and, to a large degree, its extent are dependent on the revenue from that charge.

112 It must be concluded from the above that the charge on advertising companies forms an integral part of the radio broadcasting aid scheme which that charge is intended to finance.

113 Accordingly, the Commission should have taken that charge into account when it examined the aid scheme in question, namely following notification of that scheme, at the preliminary stage of the procedure for reviewing aid under Article 93(3) of the EC Treaty.

114 It is not in dispute that, while the method by which the scheme was financed was indeed notified to the Commission, since it constituted the subject of Title I of the draft decree which subsequently became Decree No 97-1263, the Commission did not review it in the course of the procedure which concluded with the adoption of the contested decision. Before the Court, the Commission argued in fact that it was not necessary to carry out such a review, since the charge on advertising companies does not form an integral part of the radio broadcasting aid scheme.

115 It should also be noted that, in a letter of 8 May 2003, the Commission objected to a method of financing an amended version of the radio broadcasting aid scheme

that was essentially the same as the charge on advertising companies at issue in the main proceedings, taking the view that that scheme was contrary to the general principle, frequently reasserted by the Commission and confirmed by the Court in Case 47/69 *France* v *Commission* [1970] ECR 487, that imported goods and services must be exempt from any parafiscal charge designed to finance an aid scheme which benefits only national undertakings. It is only after the proposed aid in question had been amended so that the charge linked to it would henceforth cover only advertisements broadcast from French territory that the Commission decided, in its letter of 28 July 2003, not to raise any objections to the scheme.

116 Since, for the purpose of assessing whether the aid scheme in question was compatible with the rules of the Treaty on State aid, the Commission failed to take account of the method by which that aid was financed, even though it formed an integral part of that scheme, its assessment of the compatibility of that scheme with the common market is necessarily vitiated by an error.

117 On that ground, it follows that the contested decision is invalid.

118 The French Government has asked the Court, in the event of the contested decision being declared invalid, to limit the temporal effects of its judgment, excluding from those limits only those undertakings which, prior to the judgment to be delivered, brought legal proceedings or made an equivalent complaint regarding the levying of the charge on advertising companies.

119 The Commission has asked the Court, in the event of the same outcome, to preserve the effects of the invalid decision, so that neither the levying of the charges nor the allocation of the aid is affected.

120 In support of that request, it has been pointed out in particular that the aid scheme was notified to and authorised by the Commission, as were the previous schemes, and was applied for a lengthy period. The French Government considers in particular that if an obligation were imposed to recover the sums in question from the FSER and local radio stations for the period between 1998 and 2002, their finances and their very existence might be in jeopardy and the plurality of the media could be threatened.

121 In that regard, it must be noted, first, that, where it is justified by overriding considerations of legal certainty, the second paragraph of Article 231 EC, which is also applicable by analogy to a reference under Article 234 EC for a preliminary ruling on the validity of a measure adopted by the Community institutions, confers on the Court a discretion to decide, in each particular case, which specific effects of such a measure must be regarded as definitive (see to that effect, inter alia, Case C-228/99 *Silos* [2001] ECR I-8401, paragraph 35 and the case-law cited).

122 In accordance with that case-law, the Court has limited the temporal effect of a declaration that a Community measure is invalid where overriding considerations of legal certainty involving all the interests, public as well as private, at stake in

the cases concerned precluded the calling into question of the charging or payment of sums of money effected on the basis of that measure in respect of the period prior to the date of the judgment (see, inter alia, *Silos*, paragraph 36).

123 In this instance, it is clear, first, that the aid scheme in question was applicable for a period of five years and that a great deal of aid was paid under that scheme, affecting a large number of operators. Second, the overriding considerations of legal certainty invoked by both the French Government and the Commission and, in particular, the fact that the aid scheme at issue was notified to the Commission and the decision by which the latter authorised that scheme was not challenged before the Community judicature are capable of justifying the imposition of a limitation on the temporal effects of the declaration that the contested decision is invalid.

124 Next, where the Court rules, in proceedings under Article 234 EC, that a measure adopted by a Community authority is invalid, its decision has the legal effect of requiring the competent Community institutions to take the necessary measures to remedy that illegality, as the obligation laid down in Article 233 EC in the case of a judgment annulling a measure applies in such a situation by analogy (see, inter alia, Joined Cases C-120/06 P and C-121/06 P *FIAMM and Others* v *Council and Commission* [2008] ECR I-0000, paragraph 123 and the case-law cited).

125 Finally, as stated at paragraph 94 above, exclusive power is conferred on the Commission by the Treaty to assess the compatibility of State aid with the common market, subject to review by the Community judicature.

126 Accordingly, the effects of the declaration that the contested decision is invalid must be suspended until a new decision is adopted by the Commission, so that it may remedy the illegality established in this judgment. Those effects are to be suspended for a period of no more than two months from the date of delivery of this judgment if the Commission decides to adopt such a new decision under Article 88(3) EC, and for a reasonable further period if the Commission decides to initiate the procedure under Article 88(2) EC.

127 In the light of the foregoing, it is necessary, however, to grant the French Government's request to exclude from the temporal limitation of the effects of this judgment only those undertakings which, prior to the date of delivery of this judgment, brought legal proceedings or made an equivalent complaint regarding the levying of the charge on advertising companies under Decree No 97-1263.

128 Having regard to all the foregoing considerations, the answer to the question is that the contested decision is invalid. However, the effects of that declaration that the decision is invalid will be suspended pending the adoption of a new decision by the Commission under Article 88 EC. Those effects are to be suspended for a period not exceeding two months from the date of delivery of this judgment if the Commission decides to adopt such a new decision under Article 88(3) EC, and for a reasonable further period if the Commission decides to initiate the procedure under Article 88(2) EC. Only undertakings which, prior to the date of delivery of

this judgment, brought legal proceedings or made an equivalent complaint regarding the levying of the charge on advertising companies established by Article 1 of Decree No 97-1263 are excluded from the temporal limitation of the effects of this judgment.

Costs

129 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

The decision of the Commission of the European Communities of 10 November 1997 not to raise any objections to the new version of an aid scheme to support local radio stations (State aid No N 679/97 – France) is invalid.

The effects of the declaration that that decision of the Commission of the European Communities of 10 November 1997 is invalid are suspended pending the adoption of a new decision by the Commission under Article 88 EC. Those effects are to be suspended for a period not exceeding two months from the date of delivery of this judgment if the Commission decides to adopt such a new decision under Article 88(3) EC, and for a reasonable further period if the Commission decides to initiate the procedure under Article 88(2) EC. Only undertakings which, prior to the date of delivery of this judgment, brought legal proceedings or made an equivalent complaint regarding the levying of the parafiscal charge on advertisements broadcast on sound radio or television, established by Article 1 of Decree No 97-1263 of 29 December 1997 creating a parafiscal charge for the benefit of a fund to support radio broadcasting, are excluded from the temporal limitation of the effects of this judgment.

JUDGMENT OF THE COURT (Second Chamber)

7 September 2006 (*)

(State aid – Articles 87 and 88(3) EC – Tax on direct sales of medicines – Applicable to pharmaceutical laboratories rather than wholesale distributors – Prohibition on implementing a non-notified aid measure – Possibility of pleading that an aid measure is unlawful in order to obtain reimbursement of a charge – Compensation for discharging public service obligations imposed on wholesale distributors – Burden of proof in relation to overcompensation – Detailed rules laid down by national law – Prohibition on making reimbursement of a charge practically impossible or excessively difficult)

In Case C-526/04,

REFERENCE for a preliminary ruling under Article 234 EC by the Cour de cassation (France), made by decision of 14 December 2004, received at the Court on 29 December 2004, in the proceedings

Laboratoires Boiron SA

v

Union de recouvrement des cotisations de sécurité sociale et d'allocations familiales (Urssaf) de Lyon, assuming the rights and obligations of the **Agence centrale des organismes de sécurité sociale (ACOSS),**

THE COURT (Second Chamber),

composed of C.W.A. Timmermans (Rapporteur), President of the Chamber, J. Makarczyk, R. Silva de Lapuerta, P. Kūris and G. Arestis, Judges,

Advocate General: A. Tizzano,

Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 13 October 2005,

after considering the observations submitted on behalf of:

– Laboratoires Boiron SA, by A. Lyon-Caen, J. Philippe, C.-M. Dorémus and O. Cavézian, avocats,

– the Union de recouvrement des cotisations de sécurité sociale et d'allocations familiales (Urssaf) de Lyon, assuming the rights and

obligations of the Agence centrale des organismes de sécurité sociale (ACOSS), by H. Calvet and O. Billard, avocats,

– the French Government, by G. de Bergues and S. Ramet, acting as Agents,

– the Commission of the European Communities, by V. Di Bucci, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 30 March 2006,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of provisions of the EC Treaty relating to State aid, and in particular Articles 87 EC and 88(3) EC.

2 The reference was submitted in the course of an action brought by Laboratoires Boiron SA ('Boiron') seeking repayment of the sum which it had paid to the Agence centrale des organismes de sécurité sociale (Central Agency for Social Security Bodies) ('ACOSS') by way of a tax on direct sales of medicines. The Union de recouvrement des cotisations de la sécurité sociale et d'allocations familiales de Lyon (Union for recovery of social security and family allowance contributions of Lyons) ('Urssaf') subsequently assumed the rights and obligations of ACOSS.

National law

3 Article R. 5106-5 of the Code de la santé publique (Public Health Code) defines a wholesale distributor as 'any undertaking that purchases and stocks medicines other than those intended for testing on humans, for the purpose of their wholesale distribution in their unaltered state'.

4 The Ministerial Decree of 3 October 1962 on the duties of wholesale distributors in relation to the supply of medicines to pharmacies (*Journal officiel de la République française* ('JORF') of 12 October 1962, p. 9999), which was in force until February 1998, included the following provisions:

'Article 1 – Every pharmaceuticals wholesaler covered by the fourth subparagraph of Article R. 5115-6 of the Public Health Code and any branches it may have must keep a permanent stock of medicinal products sufficient to ensure a month's supply to the pharmacies in its distribution area which it regularly serves as customers.

The stock of medicines must amount to a "range" of medicines, including at least two thirds of all forms of medicines currently sold, and must represent in value the equivalent of the average monthly turnover for the preceding year.

Article 2 – Every pharmaceuticals wholesaler and any branches it may have must be able to guarantee delivery of every medicine sold on the market to the pharmacies in its distribution area which it regularly serves as customers and, in the case of medicines in their "range", within 24 hours of receipt of the relevant order.

They must manage their stock of medicines so as to ensure availability at all times.'

5 Those rules were changed, inter alia, by Decree No 98-79 of 11 February 1998 on pharmaceuticals companies amending the Public Health Code (JORF of 13 February 1998, p. 2287).

6 Article 12 of Law No 97-1164 of 19 December 1997 on social security funding for 1998 (JORF of 23 December 1997, p. 18635), which inserted inter alia Article L. 245-6-1 into the Social Security Code, introduced a tax contribution of 2.5% of pre-tax turnover achieved in France by pharmaceutical laboratories from wholesale sales of medicinal products to dispensing pharmacies, mutual pharmacies and pharmacies belonging to mining friendly societies. The contribution is called the 'tax on direct sales'.

7 Article L. 245-6-4 of the Social Security Code provides that the tax on direct sales is levied for the Caisse nationale d'assurance maladie des travailleurs salariés (National Sickness Insurance Fund for Employees).

8 The French Conseil Constitutionnel pointed out in Decision No 97-393 of 18 December 1997 (JORF of 23 December 1997, p. 18649), which it handed down in an action challenging Article 12 of Law No 97-1164, that the tax on direct sales, which is not levied on sales of medicines by wholesale distributors, was introduced to help finance the National Sickness Insurance Fund and to restore the balance of competition between the various distribution channels for medicines, considered to be distorted by the fact that wholesale distributors are under a duty of public service which is not imposed on pharmaceutical laboratories.

9 Article L. 245-6-1 of the Social Security Code was repealed, with effect from 1 January 2003, by Article 16 of Law No 2002-1487 of 20 December 2002 on social security financing for 2003 (JORF of 24 December 2002, p. 21482).

The main proceedings and the questions referred for a preliminary ruling

10 Boiron is a company incorporated under French law which produces homeopathic medicines which it distributes in France exclusively to pharmacies through a system of direct sales or through wholesale distributors.

11 In relation to the tax on direct sales for 1998 and 1999, Boiron declared to ACOSS only the turnover from direct sales to pharmacies, excluding that corresponding to sales through wholesale distributors.

12 ACOSS took the view that the latter turnover should be included in the total of direct sales on which the tax is based, and thus made an adjustment to reflect the inclusion of that amount.

13 Boiron paid the amount claimed but at the same disputed it. In the absence of a response from the board of ACOSS, to which it had submitted an administrative appeal, Boiron brought proceedings before the Tribunal des affaires de sécurité sociale de Lyon (Social Security Tribunal, Lyons) to obtain repayment of the amount paid.

14 In support of its action, Boiron essentially argued that exempting wholesale distributors from the disputed tax amounted to unlawful State aid within the meaning of Article 87 EC.

15 By decision of 3 June 2000, the Tribunal des affaires de sécurité sociale de Lyon granted Boiron's application and ordered ACOSS to repay Boiron the amount paid.

16 The Cour d'appel de Lyon (Court of Appeal, Lyons), to which ACOSS appealed, first stayed the proceedings until judgment was given by the Court of Justice in Case C-53/00 *Ferring* [2001] ECR I-9067, and then by judgment of 29 October 2002 set aside the judgment given at first instance.

17 Boiron entered an appeal in law, raising four pleas of which the first, relating to the interpretation of provisions of the Treaty on State aid, is the subject of the questions referred for a preliminary ruling.

18 The Cour de cassation (Court of Cassation) points out, first, that the Cour d'appel de Lyon dismissed Boiron's appeal, holding, on the basis of the judgment of the Court of Justice in Case C-390/98 *Banks* [2001] ECR I-6117, paragraph 80 and the case-law cited therein, that 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. That case-law was confirmed by the judgment in Joined Cases C-430/99 and C-431/99 *Sea-Land Service and Nedlloyd Lijnen* [2002] ECR I-5235, paragraph 47.

19 The referring court observes that in other judgments the Court of Justice has not declared inadmissible actions for reimbursement of taxes or of contributions levied in breach of the obligation of prior notification laid down in Article 88(3) EC.

20 The Cour de cassation is of the view that those judgments either rule on the point only implicitly, even if a plea of inadmissibility was raised (see *Ferring*), or relate to aid schemes in respect of which the charges or contributions for which

reimbursement was sought had been levied specifically for the purpose of financing the contested aid (See Joined Cases C-261/01 and C-262/01 *Van Calster and Others* [2003] ECR I-12249 and Case C-126/01 *GEMO* [2003] ECR I-13769).

21 The national court recalls, secondly, that in the judgment in *Ferring*, the Court held that the tax on direct sales, because it is charged only on direct sales of medicines by pharmaceutical laboratories, amounts to State aid to wholesale distributors only to the extent that the advantage in not being assessed to that tax exceeds the additional costs that they bear in discharging the public service obligations imposed on them by national law.

22 The Cour de cassation observes that, in Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, the Court of Justice stated that in order for public subsidies to be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, it is for the national court to ascertain that the following conditions are satisfied ('the so-called "Altmark" conditions'):

– first, the recipient undertaking must actually be required to discharge public service obligations and those obligations have to be clearly defined;

– second, the parameters on the basis of which the compensation is calculated must be established beforehand in an objective and transparent manner;

– third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations;

– fourth, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided for so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

23 In that respect, the national court points out first that the so-called 'Altmark' conditions relate to data to which an economic operator, which alleges that the aid is unlawful and which is not involved in the legal relations linking the recipient of the subsidy or exemption to the State or the body which the State has set up or appointed to manage that aid, does not necessarily have access if it is not involved in proceedings challenging the recipient itself.

24 The Cour de cassation goes on to observe that, according to the settled case-law of the Court, any rules of evidence which have the effect of making it virtually impossible or excessively difficult to secure repayment of charges levied in

breach of Community law are incompatible with Community law (see, in particular, Case 199/82 *San Giorgio* [1983] [1983] ECR 3595, paragraph 14, and Case C-343/96 *Dilexport* [1999] ECR I-579, paragraph 48).

25 The national court observes, finally, that under provisions of national law on the burden of proof, an economic operator which alleges in support of its claim for repayment that the measure at issue amounts to State aid can be required to show that the so-called 'Altmark' conditions are not met. It adds that the failure to produce the evidence necessary for that operator's claim to succeed may be the only impediment to proving that that measure amounts to State aid.

26 In those circumstances, the Cour de cassation decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Community law be interpreted as meaning that a pharmaceutical laboratory liable to pay a contribution such as that under Article 12 of Law No 97-1164 of 19 December 1997 on social security funding for 1998 is, in order to obtain its repayment, entitled to plead that the fact that wholesale distributors are not liable for that contribution constitutes State aid?

(2) If the answer to Question 1 is in the affirmative and since the success of the claim for repayment may depend solely on evidence produced by the claimant, must Community law be interpreted as meaning that rules of national law which make that repayment subject to proof by the claimant that the advantage received by the wholesale distributors exceeds the costs which they bear in discharging the public service obligations imposed on them by the national legislation or that the conditions laid down by the Court of Justice in [*Altmark Trans and Regierungspräsidium Magdeburg*] are not satisfied constitute rules of evidence which have the effect of making it practically impossible or excessively difficult to secure repayment of a mandatory contribution, such as that under Article 245-6-1 of the Social Security Code, which has been claimed before the competent authority, on the ground that the exemption from the contribution to which those wholesale distributors are entitled constitutes State aid which has not been notified to the Commission of the European Communities?'

The questions

The first question

27 It is clear from the judgment in *Ferring* that Article 87 EC is to be interpreted as meaning that, because it is charged only on direct sales of medicines by pharmaceutical laboratories, a measure such as the direct tax on sales amounts to State aid to wholesale distributors only to the extent that it overcompensates the latter, that is to say, in so far as the advantage for those economic operators in not being liable to that charge exceeds the additional costs that they bear in discharging the public service obligations imposed on them by national law.

28 In the present case, Boiron, a pharmaceutical laboratory liable to the tax on direct sales, argues that the fact that the wholesale distributors are not liable for that charge overcompensates them and, as such, thus amounts to unlawful aid in their favour. On that basis, the operator has claimed reimbursement of the amounts paid in respect of that tax for the financial years 1998 and 1999.

29 In that respect, it should be pointed out that an aid measure within the meaning of Article 87(1) EC which is put into effect in infringement of the obligations arising from Article 88(3) EC is unlawful. It is for the national courts to uphold the rights of the persons concerned in the event of a possible breach by the national authorities of the prohibition on putting aid into effect, drawing all the necessary consequences under national law as regards both the validity of decisions giving effect to aid measures and the recovery of the financial support granted (see, in particular, Joined Cases C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04 *Distribution Casino France and Others* [2005] ECR I-9481, paragraph 30 and the case-law cited therein).

30 It is true that in a number of cases brought before it the Court of Justice has held that those liable to pay a charge cannot rely on the argument that the exemption enjoyed by other businesses constitutes State aid in order to avoid payment of that charge or to obtain reimbursement (see, in particular, *Banks*, paragraph 80, and *Distribution Casino France*, paragraphs 42 and 44, and Joined Cases C-393/04 and C-41/05 *Air Liquide* [2006] ECR I-0000, paragraph 43).

31 However, the nature of the national measures at issue in the cases giving rise to the judgments referred to in the preceding paragraph differs essentially from that of the tax on direct sales.

32 Each of those cases concerns an exemption for certain operators from a tax of general application and in which it is alleged that that exemption itself amounted to an aid measure.

33 The case in the main proceedings here, by contrast, does not involve such a taxation scheme, but rather a charge for which only one of the two categories of competing operators, namely pharmaceutical laboratories, is liable.

34 In such a case of unequal liability for a charge, the supposed aid derives from the fact that another category of economic operators with which the category subject to the charge is in direct competition, in this case wholesale distributors, is not liable for that charge.

35 In the present case, it is common ground that that absence of liability is, moreover, a deliberate objective, if not the principal objective, of the tax on direct sales.

36 In this respect, it should be noted that the Court observed in paragraph 19 of *Ferring* that there are two directly competing distribution channels for medicines in France, that of the wholesale distributors and that of the pharmaceutical

laboratories which sell directly to pharmacies. The Court further stated in that paragraph that a particular objective of the tax on direct sales is to restore the balance of competition between the two distribution channels for medicines, which, according to the French legislature, is distorted by the imposition of public service obligations on wholesale distributors alone. Finally, the Court added that, following the introduction of Law No 97-1164 and the direct sales tax, not only did the growth of direct sales recorded in the immediately preceding years cease, but the trend was even reversed, with wholesale distributors recovering market share.

37 If it were shown that the absence of liability to the tax on direct sales leads to an overcompensation of the wholesale distributors, to the extent that the advantage in not being liable exceeds the additional costs that they bear in discharging the public service obligations imposed on them, the liability of a pharmaceutical laboratory such as Boiron to such a charge would constitute an act giving effect to an aid measure.

38 If this were the case, as pointed out in paragraph 29 of the present judgment, it would be for the national courts to draw all the necessary consequences under national law as regards the validity of such an act.

39 In this case, the measure alleged to constitute an aid is the tax on direct sales itself and not some exemption which is separable from that tax.

40 In such a case, it should be accepted that an economic operator such as Boiron may plead that the charge on direct sales is unlawful, for the purposes of applying for reimbursement, on the ground that it amounts to an aid measure.

41 The result of this would not, in any case, be to allow the national court to increase the number of recipients of the aid. On the contrary, such reimbursement, to the extent that it is payable, is a very appropriate way of reducing the number of economic operators harmed by the measure deemed to constitute aid, and thus, of limiting the anti-competitive effects of that measure.

42 The referring court and the parties which submitted observations before the Court raised the question as to whether such a right to plead that the tax on direct sales deemed to be State aid is unlawful in order to obtain reimbursement is consistent with the principles underlying the case-law of the Court in relation to parafiscal charges first set down in the judgment in *Van Calster*, and developed in subsequent judgments.

43 It is clear from that case-law that, where an aid measure of which the method of financing is an integral part has been implemented in breach of the obligation to notify, national courts must in principle order reimbursement of charges or contributions levied specifically for the purpose of financing that aid (*Van Calster*, paragraph 54).

44 In that regard, the Court has stated that, for a tax to be regarded as forming an integral part of an aid measure, it must be hypothecated to the aid measure under the relevant national rules, in the sense that the revenue from the tax is necessarily allocated for the financing of the aid (see, in particular, *Air Liquide*, paragraph 46 and the case-law cited therein).

45 In the case of the tax on direct sales, a special feature is that that charge and the alleged aid measure constitute two elements of one and the same fiscal measure which are inseparable. In such a case, the charge and the aid are more closely linked than in the case of a parafiscal charge such as that forming the subject-matter of the judgment in *Van Calster*.

46 In those circumstances, to grant an economic operator such as Boiron the right to plead that the tax on direct sales is unlawful in order to obtain reimbursement of the sums paid by way of that tax is consistent with the principles underlying the case-law of the Court in relation to parafiscal charges first set down in the judgment of *Van Calster*, and developed in subsequent judgments.

47 It should be added that, in any event, such reimbursement can be granted only if it is shown that those sums or, at the very least, the part of those sums for which reimbursement is claimed, amount to an overcompensation of wholesale distributors and thus, by this measure, confer an economic advantage on the latter, if, in addition, the other conditions referred to in Article 87(1) EC for a measure to be classed as State aid are also fulfilled.

48 Having regard to the foregoing, the answer to the first question must be that Community law must be interpreted as meaning that a pharmaceutical laboratory liable to pay a contribution such as that provided for by Article 12 of Law No 97-1164 is entitled to plead that the fact that wholesale distributors are not liable for that contribution constitutes State aid, in order to obtain reimbursement of the part of the sums paid which corresponds to the economic advantage unfairly obtained by wholesale distributors.

The second question

49 In the case in the main proceedings, a pharmaceutical laboratory liable to pay the tax on direct sales, where it is common ground that that charge was not notified under Article 88(3) EC, pleads, in order to obtain its reimbursement, that that charge is unlawful on the ground that the fact that wholesale distributors, which are the laboratory's direct competitors, are not liable to pay that contribution constitutes State aid.

50 In that context, the national court is asking essentially whether compliance with the principle of effectiveness is ensured where, in order to be able to obtain reimbursement of the sums paid by way of the tax on direct sales in accordance with the applicable national law on the burden of proof, it is for the economic operator seeking reimbursement of those sums to establish that the absence of liability of wholesale distributors amounts to an overcompensation of the latter,

inasmuch as at least one of the so-called 'Altmark' conditions is not met, and thus, as such, constitutes an economic advantage referred to in Article 87(1) EC.

51 In the absence of Community rules governing the matter, as is the case in the main proceedings, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effects of Community law, provided that such rules are not less favourable than those governing similar domestic actions (the principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness) (see, inter alia, Case C-276/01 *Steffensen* [2003] ECR I-3735, paragraph 60 and the case-law cited therein).

52 In that respect, the national court observes, first, that if in principle the burden of proof in respect of overcompensation of wholesale distributors, requiring it to be shown that at least one of the four so-called 'Altmark' conditions is not met, falls, in accordance with the applicable national law, on the economic operator alleging that such overcompensation constitutes aid in order to obtain reimbursement of the charge at issue, that national law also confers on the national court a wide power to order of its own motion all measures of inquiry permissible in law.

53 The national court points out, secondly, that that power is purely discretionary and that the failure of that operator to produce the evidence necessary for its claim to succeed may be the only obstacle to showing that the tax on direct sales amounts to State aid within the meaning of Article 88(3) EC, inasmuch as the so-called 'Altmark' conditions relate to data to which that operator does not necessarily have access if it is not involved in proceedings challenging the recipient of the alleged aid.

54 The Union de Recouvrement des cotisations de la Sécurité Sociale et d'Allocations Familiales (Urssaf) de Lyon also stated that the national court has, in particular, the power to order a party to the proceedings or a third party to produce a particular document.

55 In those circumstances, in order to ensure compliance with the principle of effectiveness, if the national court finds that the fact of requiring a pharmaceutical laboratory such as Boiron to prove that wholesale distributors are overcompensated, and thus that the tax on direct sales amounts to State aid, is likely to make it impossible or excessively difficult for such evidence to be produced, since inter alia that evidence relates to data which such a laboratory will not have, the national court is required to use all procedures available to it under national law, including that of ordering the necessary measures of inquiry, in particular the production by one of the parties or a third party of a particular document.

56 Having regard to the foregoing, the answer to the second question must be that Community law does not preclude the application of rules of national law which

make reimbursement of an obligatory contribution, such as that provided for in Article 12 of Law No 97-1164, subject to proof by the claimant seeking reimbursement that the advantage derived by wholesale distributors from their not being liable to pay that contribution exceeds the costs which they bear in discharging the public service obligations imposed on them by the national rules and, in particular, that at least one of the so-called 'Altmark' conditions is not satisfied.

57 However, in order to ensure compliance with the principle of effectiveness, if the national court finds that the fact of requiring a pharmaceutical laboratory such as Boiron to prove that wholesale distributors are overcompensated, and thus that the tax on direct sales amounts to State aid, is likely to make it impossible or excessively difficult for such evidence to be produced, since inter alia that evidence relates to data which such a laboratory will not have, the national court is required to use all procedures available to it under national law, including that of ordering the necessary measures of inquiry, in particular the production by one of the parties or a third party of a particular document.

Costs

58 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **Community law must be interpreted as meaning that a pharmaceutical laboratory liable to pay a contribution such as that provided for by Article 12 of Law No 97-1164 of 19 December 1997 on social security funding for 1998 is entitled to plead that the fact that wholesale distributors are not liable for that contribution constitutes State aid in order to obtain reimbursement of the part of the sums paid which corresponds to the economic advantage unfairly obtained by wholesale distributors.**

2. **Community law does not preclude the application of rules of national law which make reimbursement of a mandatory contribution such as that provided for in Article 12 of Law No 97-1164 subject to proof by the claimant seeking reimbursement that the advantage derived by wholesale distributors from their not being liable to pay that contribution exceeds the costs which they bear in discharging the public service obligations imposed on them by the national rules and, in particular, that at least one of the conditions laid down in the judgment in Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747 is not satisfied.**

However, in order to ensure compliance with the principle of effectiveness, if the national court finds that the fact of requiring a pharmaceutical laboratory such as Boiron to prove that wholesale distributors are overcompensated, and thus that the tax on direct sales amounts to State aid, is likely to make it impossible or excessively difficult for such evidence to be produced, since inter alia that evidence relates to data which such a laboratory will not have, the national court is required to use all procedures available to it under national law, including that of ordering the necessary measures of inquiry, in particular the production by one of the parties or a third party of a particular document.

[Signatures]

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PRACTICAL GUIDANCE FOR ADVOCATES BEFORE THE GENERAL COURT IN DIRECT ACTIONS

This practical guidance is addressed principally to those appearing for the first time in the General Court or appear infrequently. It has been drafted by the Permanent Delegation to the Court of Justice of the Council of Bars and Law Societies of Europe (CCBE) in order to enhance the efficiency of the use of direct actions (e.g. annulment action or declaration for failure to act) by Advocates from the EU. These tips are designed to complement the Court's own guidance set out on the Court's website under the heading "Procedure" and in particular in the Notes for the Guidance of Counsel: http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt9_2008-09-25_17-37-52_275.pdf.

The General Court's 1991 Rules of Procedure were amended several times, the last time in 2013. The consolidated edition of these Rules of Procedure and the other texts governing the procedure before the General Court are available online at the following address: http://curia.europa.eu/jcms/jcms/Jo2_7040/.

This guidance addresses three topics:

1. **Written submissions in direct actions**
2. **Oral pleadings in direct actions**
3. **Practical issues in direct actions**

1. Written Submissions in Direct Actions

General

- Keep written pleadings as short as reasonably possible, having regard to the page limits indicated by the General Court's Practice Directions (see below)
- Advocates who have created an 'e-curia' account (https://curia.europa.eu/e-Curia/access-request-step1.faces) can lodge and receive all their procedural documents via the 'e-curia' application – otherwise every written pleading can be submitted electronically (by fax or email) but the original documents dated and physically signed by the Advocate must always be lodged at the Registry within the next ten days
- The use of language other than the language of the case (which is that chosen by the applicant) may be granted to other parties, if requested, in limited circumstances, usually in intellectual property cases, and may be for the written or the oral phase of the proceedings or both
- The deadline of two months and ten days to reply cannot be extended – late pleadings are returned, making it possible for the defendant to be judged by default
- Bear in mind that an oral hearing is not automatically granted by the General Court and therefore the written pleading may be the sole opportunity to influence the outcome of the case
- The first round of written pleading may usually be supplemented by a reply from the applicant and by a rejoinder from the defendant – entirely new pleas not included in the application are not accepted, unless otherwise decided by the General Court

Drafting style

- Keep the style simple so that it translates easily – punchy uncomplicated sentences are best – and avoid use of national legal jargon which may be difficult to translate correctly
- Consider asking a non-native speaker to read your text to check for likely ease of translation
- As far as possible, try to be precise and concise

Structure

- Organize your written pleading clearly and logically – division into sections with clear headings and numbered of paragraph is recommended
- In addition to the summary of the facts and main arguments, a table of contents is necessary in complex cases
- Written pleadings are usually structured as follows: indication of the type of decision sought, summary of the relevant facts and/or procedure; presentation of the pleas in law; and formulation of the form of order sought

Content

- The written pleadings are fundamental and will be carefully studied by the General Court. They define the case and it may be difficult to correct mistaken impressions at the oral hearing
- Depending on the circumstances of the cases, the indicative maximum number of pages set by the Practice Directions is 50 pages for the application and the defence and 25 pages for the reply and the rejoinder (but respectively 20 and 15 pages for intellectual property cases) though a margin of tolerance is specified and the Court may permit larger documents if good reasons are given
- Focus on the good points and avoid repetition
- Apply the new method of citing the case-law as explained at http://curia.europa.eu/jcms/jcms/P_125997/
- Pleas and legal arguments may not be made in the Annexes (which in any case are not usually translated into the Court's working language (French) and will not be read by all members of the chanber hearing the case)

2. Oral Pleadings in Direct Actions

Generally

- Prior to the oral pleading, the General Court may order measures of instruction and may invite the parties to focus on specific arguments
- It is important to respond promptly to the Registry's letter enquiring about an oral hearing, giving reasons why one is necessary
- Postponement of the hearing date is rarely granted by the General Court (unless it has scheduled two hearings for the same date involving the same advocates)
- Time allotted for the main pleadings (normally 15 mins in 3 Judge chambers and 20 mins in 5 Judge chambers) are strictly adhered to; extensions may be granted in advance on written application to the Registry
- In principle, the Court prefers only one advocate per party to plead orally, although permission for more than one speaker may be granted in advance on written application or even at the hearing
- Contact the Registry by e-mail or telephone to ask which parties are attending the oral hearing (and to obtain the Advocates' contact details if needed)
- If your client has the same interest as other parties (including Institutions or Member States), discuss in advance who is going particularly to focus on which points
- If the General Court requests the parties to deal with particular issues, consider whether it is necessary to focus exclusively on these issues
- If possible, send your speaking notes or at least a summary thereof (e.g. 3-4 pages with highlights/bullet points) – including references to any judgments from which you intend to quote – to the interpreters in advance at the following e-mail: interpret@curia.europa.eu. In the alternative, hand out a hard copy before the hearing (see below)
- If you intend to refer in your presentation to case-law that has not previously been cited in the written pleadings, bring copies to the hearing
- Advocates shall wear robes at the hearing (except in interim proceedings). Bring your own – however, robes are usually available for those who forgot in the Salon des Avocats

What to expect

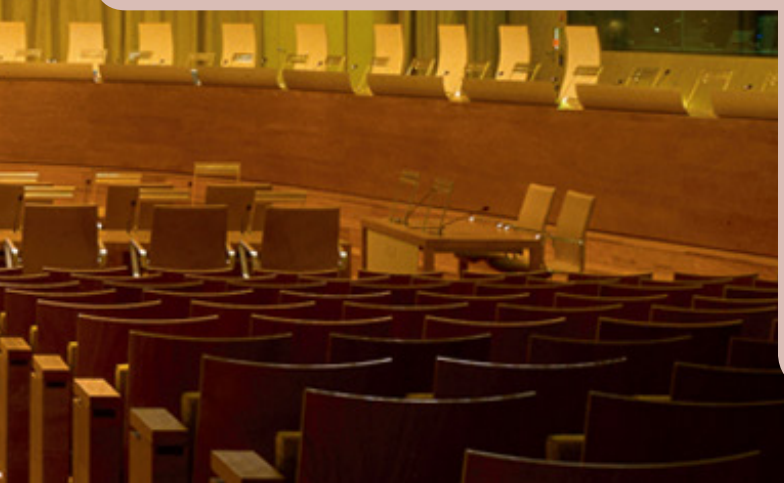
- Find your Courtroom and the Salon des Avocats allocated where you can leave any luggage you may have and put on your robes
- After arrival at the Courtroom, one of the interpreters is likely to ask for a copy of any speaking notes you have for your presentation – so bring spare copies (they are also used to making a photocopy of your notes)
- Immediately before the hearing commences, the Registrar will invite the Advocates who are pleading to meet the Judges in their deliberation room behind the courtroom - a frequently asked question is whether you are going to need all of the allocated time - on occasion the President or the reporting Judge ask the Advocates to address certain issues
- The order of oral pleadings follows that of the main pleadings, with interveners following the party that they support, after which there will be questions from the Bench and an opportunity to reply to any of the issues raised in the course of the hearing
- The order of main pleadings is set by the President but usually consists of the applicant, followed by the possible interveners supporting its position, and the defendant, also followed by potential interveners
- Questions may or may not arise from the Court (either during your speech or afterward) – you must be prepared to answer questions both on the facts and on the law
- Ensure that your team is seated in such position as to be able to assist the speaker (e.g. in responding to the questions)
- Closing replies must be kept short and should be limited to points that arise from the oral pleadings - they can be dispensed with unless you really have something to say; however, the Commission often tries to introduce a new point by way of last word and you should be prepared to contest this

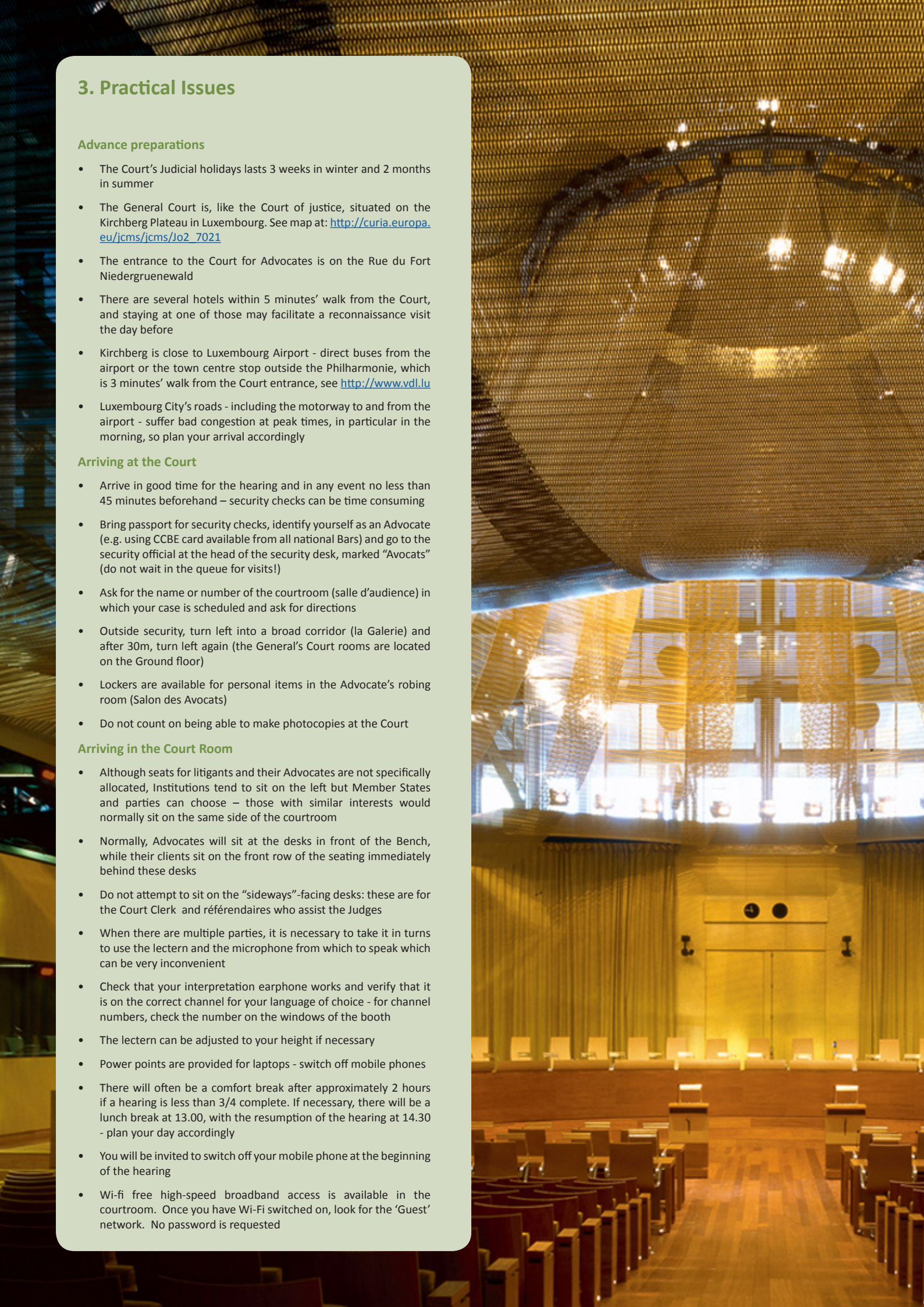
The pleading itself

- Focus on the members of the General Court - in particular the reporting Judge and the President of chamber (indicated on a sheet of paper attached to the lectern)
- Stand at the lectern at all times when you speak (including in reply to questions) and prepare your papers, earpiece etc. accordingly
- Speak into the microphone (make sure it is switched on) - otherwise the interpreters cannot hear you! and adjust it for height
- Avoid reading out a written speech which runs the risk that you speak too quickly and that translation of your statements will be poor
- Do not feel bound to follow any speaking notes given to the interpreters which is simply a general guide
- Make sure you can deal with the points made by others during the hearing
- Ideally speak freely, with your head up, using a normal conversational style and speed
- Cut your speaking points down in length - shorter sentences without subordinate clauses work better than longer ones
- Speak particularly clearly and slowly when giving numbers and references
- Literary flourishes, jokes and idiomatic speech risk being misunderstood
- Do not interrupt the other party's submissions without the President's permission

Content

- Open your speech with a brief statement of what you say the case is about
- Do not repeat your written arguments in detail – seek to convey the fundamental reason why the General Court should adopt your position
- Focus on the 2 or 3 most important points whilst showing that you are ready to deal with all other points
- Focus on any relevant developments in the case law since the date of filing of your last written pleading
- Avoid repetition of points made by others – if appropriate, simply adopt the previous speaker's points
- Comply promptly with requests from the Bench, including a request to stop speaking





3. Practical Issues

Advance preparations

- The Court's Judicial holidays lasts 3 weeks in winter and 2 months in summer
- The General Court is, like the Court of justice, situated on the Kirchberg Plateau in Luxembourg. See map at: http://curia.europa.eu/jcms/jcms/Jo2_7021
- The entrance to the Court for Advocates is on the Rue du Fort Niedergruenewald
- There are several hotels within 5 minutes' walk from the Court, and staying at one of those may facilitate a reconnaissance visit the day before
- Kirchberg is close to Luxembourg Airport - direct buses from the airport or the town centre stop outside the Philharmonie, which is 3 minutes' walk from the Court entrance, see http://www.vdl.lu
- Luxembourg City's roads - including the motorway to and from the airport - suffer bad congestion at peak times, in particular in the morning, so plan your arrival accordingly

Arriving at the Court

- Arrive in good time for the hearing and in any event no less than 45 minutes beforehand – security checks can be time consuming
- Bring passport for security checks, identify yourself as an Advocate (e.g. using CCBE card available from all national Bars) and go to the security official at the head of the security desk, marked "Avocats" (do not wait in the queue for visits!)
- Ask for the name or number of the courtroom (salle d'audience) in which your case is scheduled and ask for directions
- Outside security, turn left into a broad corridor (la Galerie) and after 30m, turn left again (the General's Court rooms are located on the Ground floor)
- Lockers are available for personal items in the Advocate's robing room (Salon des Avocats)
- Do not count on being able to make photocopies at the Court

Arriving in the Court Room

- Although seats for litigants and their Advocates are not specifically allocated, Institutions tend to sit on the left but Member States and parties can choose – those with similar interests would normally sit on the same side of the courtroom
- Normally, Advocates will sit at the desks in front of the Bench, while their clients sit on the front row of the seating immediately behind these desks
- Do not attempt to sit on the "sideways"-facing desks: these are for the Court Clerk and référendaires who assist the Judges
- When there are multiple parties, it is necessary to take it in turns to use the lectern and the microphone from which to speak which can be very inconvenient
- Check that your interpretation earphone works and verify that it is on the correct channel for your language of choice - for channel numbers, check the number on the windows of the booth
- The lectern can be adjusted to your height if necessary
- Power points are provided for laptops - switch off mobile phones
- There will often be a comfort break after approximately 2 hours if a hearing is less than 3/4 complete. If necessary, there will be a lunch break at 13.00, with the resumption of the hearing at 14.30 - plan your day accordingly
- You will be invited to switch off your mobile phone at the beginning of the hearing
- Wi-fi free high-speed broadband access is available in the courtroom. Once you have Wi-Fi switched on, look for the 'Guest' network. No password is requested