JUDGMENT OF THE COURT (First Chamber)

10 November 2016 (*)

(Appeal — State aid — State aid scheme in favour of the national public broadcast organisation — Public service obligations — Set-off — Article 106(2) TFEU — Decision declaring the aid scheme compatible with the internal market — Alteration of the method of financing — Tax measures — Tax imposed on pay-television operators — Decision declaring the amended aid scheme compatible with the internal market — Taking into account of the method of financing — Existence of hypothecation between the tax and the aid scheme — Direct impact of the revenue from the tax on the amount of the aid — Coverage of the net costs of fulfilling the public service mandate — Competitive relationship between the person liable to pay the tax and the beneficiary of the aid — Distortion of national law)

In Case C?449/14 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 23 September 2014,

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

applicant,

the other parties to the proceedings being:

European Commission, represented by C. Urraca Caviedes, B. Stromsky and G. Valero Jordana, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

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

Telefónica Móviles España SA, established in Madrid,

represented by F. González Díaz, F. Salerno and V. Romero Algarra, abogados,

Kingdom of Spain, represented by A. Sampol Pucurull, acting as Agent,

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

interveners at first instance,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, E. Regan (Rapporteur), A. Arabadjiev, C.G. Fernlund, and S. Rodin, Judges,

Advocate General: Y. Bot,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 16 March 2016,

after hearing the Opinion of the Advocate General at the sitting on 7 July 2016,

gives the following

Judgment

1 By its appeal, DTS Distribuidora de Televisión Digital SA ('DTS') seeks to have set aside the judgment of the General Court of the European Union of 11 July 2014, *DTS Distribuidora de Televisión Digital* v *Commission* (T?533/10, 'the judgment under appeal', EU:T:2014:629), by which the General Court dismissed its application for annulment of Commission Decision 2011/1/EU of 20 July 2010 on the State aid scheme C 38/09 (ex NN 58/09) which Spain is planning to implement for Corporación de Radio y Televisión Española (RTVE) (OJ 2011 L 1, p. 9) ('the contested decision').

Background to the dispute

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

3 Corporación de Radio y Televisión Española SA ('RTVE'), is the Spanish public radio and television broadcasting organisation which has been entrusted with a public service mandate in those fields by Ley 17/2006 de la radio y la televisión de titularidad estatal (Law No 17/2006 on State-owned radio and television) of 5 June 2006 (BOE No 134 of 6 June 2006, p. 21270).

4 Law No 17/2006 provided for a dual funding scheme: RTVE received revenue from its commercial activities, in particular the sale of advertising space, and payments from the Spanish State as compensation for the fulfilment of its public service mandate.

5 The European Commission approved that system of financing by Decisions C(2005) 1163 final of 20 April 2005 on State aid to RTVE (E 8/05) (summarised in OJ 2006 C 239, p. 17) and C(2007) 641 final of 7 March 2007 on the funding of measures to reduce staff numbers at RTVE (NN 8/07) (summarised in OJ 2007 C 109, p. 2).

6 That funding system was altered by Ley 8/2009 de financiación de la Corporación de Radio y Televisión Española (Law No 8/2009 on the funding of RTVE) of 28 August 2009 (BOE No 210 of 31 August 2009, p. 74003). That law came into force on 1 September 2009.

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

8 Next, in order to offset the loss of other commercial revenue, Law No 8/2009 introduced or amended, in Article 2(1)(b) to (d) and Articles 4 to 6 thereof, a number of fiscal measures ('the fiscal measures at issue'), including a new tax of 1.5% on the revenues of pay-television operators established in Spain ('the tax on pay-television operators'). The contribution of that tax to RTVE's budget was limited to 20% of the total annual support for RTVE, any surplus tax revenue being

paid into the general budget of the State. That law also provided, inter alia, for a new tax on the revenues of telecommunications services operators established in Spain.

9 Furthermore, the compensation for the fulfilment of the public service obligations provided for in Law No 17/2006 was maintained. Thus, in the event that the funding sources mentioned above should prove insufficient to cover the whole of RTVE's costs of fulfilling those obligations, the State was required, under Article 2(2) of Law No 8/2009 and Article 33 of Law No 17/2006, to make good the shortfall, thus transforming RTVE's dual funding scheme into an almost entirely publicly funded scheme.

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

11 After receiving, on 22 June 2009, a complaint drawing attention to the bill which was to become Law No 8/2009, the Commission notified the Kingdom of Spain on 2 December 2009 that it had decided to initiate the procedure laid down in Article 108(2) TFEU in respect of the change to RTVE's funding scheme (summarised in OJ 2010 C 8, p. 31).

12 On 18 March 2010, the Commission commenced proceedings for failure to fulfil obligations under Article 258 TFEU, on the ground that the tax on the revenues of telecommunications services operators established in Spain 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 (OJ 2002 L 108, p. 21). On 30 September 2010, in a reasoned opinion, the Commission requested the Kingdom of Spain to abolish the tax on the ground of its incompatibility with that directive.

13 On 20 July 2010, the Commission adopted the contested decision, in which it declared that the alteration of RTVE's funding scheme brought about by Law No 8/2009 was compatible with the internal market under Article 106(2) TFEU. In that context, the Commission considered, in particular, that the fiscal measures at issue were not an integral part of the new items of aid provided for by that law and that any incompatibility of those fiscal measures with Directive 2002/20 therefore did not affect the assessment of the funding scheme's compatibility with the internal market. In addition, it took the view that RTVE's amended funding scheme was consistent with Article 106(2) TFEU, since it complied with the principle of proportionality.

The judgment under appeal

14 By application lodged at the Registry of the General Court on 24 November 2010, DTS brought an action for annulment of the contested decision. In support of that application, DTS put forward three pleas in law, alleging, respectively, failure to have regard to the concept of 'aid' within the meaning of Article 107 TFEU as regards the inseparability of the fiscal measures at issue; infringement of Article 106(2) TFEU; and infringement of Articles 49 and 63 TFEU.

15 By the judgment under appeal, the General Court rejected each of the pleas on the substance and, accordingly, dismissed the action in its entirety.

Procedure before the Court and forms of order sought

16 By its appeal, DTS, supported by Telefónica de España SA and Telefónica Móviles España SA (together, ‘the Telefónica companies’) requests the Court to:

– set aside the judgment under appeal;

– annul the contested decision or, in the alternative, refer the case back to the General Court; and

– order the Commission and the other parties to pay the costs incurred before the Court of Justice and the General Court.

17 The Commission requests the Court to dismiss the appeal and to order DTS to pay the costs. The Kingdom of Spain and RTVE claim, primarily, that the appeal is inadmissible and, subsidiarily, ask the Court to reject it as unfounded.

18 The Telefónica companies brought a cross-appeal, claiming that the Court should set aside the judgment under appeal and order the Commission and the interveners which support it to pay the costs incurred before the Court of Justice and the General Court. RTVE, the Kingdom of Spain and the Commission contend that the Court should dismiss that cross-appeal.

The main appeal

19 In support of its appeal, DTS, after having stated that, by its appeal, it only criticises the General Court for having held that, in the judgment under appeal, the Commission correctly held in the contested decision that it was not required to assess the compatibility with the FEU Treaty of the tax on pay-television operators, relies on three grounds of appeal.

20 The first ground of appeal is based on infringement of Article 107(1) TFEU on account of an incorrect interpretation of the concept of aid. The second ground of appeal rests on infringement of that provision, in that the General Court did not, in the judgment under appeal, undertake a full review of the existence of aid and distorted Spanish law. The third ground of appeal rests on an error of law in the application of Article 106(2) TFEU.

Admissibility of the appeal

Arguments of the parties

21 RTVE submits that the appeal, taken as a whole, is inadmissible since, at 40 pages, it significantly exceeds the maximum length of 25 pages authorised by the Practice directions to parties concerning cases brought before the Court (OJ 2014 L 31, p. 1, ‘the practice directions’), without DTS explaining the need to do so.

22 Furthermore, RTVE and the Kingdom of Spain contend that the appeal does not precisely identify the paragraphs of the judgment under appeal which are disputed. In their submission, the appeal thus merely repeats the arguments put forward at first instance.

23 DTS submits that its appeal is admissible.

Findings of the Court

24 First of all, it should be noted that the Practice directions to parties are indicative and have no binding force. As is apparent from recitals 1 to 3 of those directions, they were adopted in order to supplement and clarify the rules applicable to the conduct of proceedings before the Court, in

the interest of the proper administration of justice, and are not intended to replace the relevant provisions of the Statute of the Court of Justice of the European Union and the Rules of Procedure of the Court (see, to that effect, order of the President of the Court of 30 April 2010, *Ziegler* v *Commission*, C?113/09 P(R), not published, EU:C:2010:242, paragraph 33).

25 It is therefore clearly apparent from the wording of paragraph 20 of those practice directions, which state that 'the appeal ..., unless there are special circumstances, should not exceed 25 pages', that that recital does not set out an absolute limitation on the number of pages to which the admissibility of such an appeal is subject, but that it merely provides a recommendation in that regard to the parties.

26 It follows that the appeal may not be rejected as inadmissible on the ground that it exceeds a certain number of pages.

27 Secondly, it should be noted that, according to the second subparagraph of Article 256(1) TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union and Article 168(1)(d) of the Rules of Procedure, an appeal must, on penalty of being deemed inadmissible, indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and the legal arguments specifically advanced in support of the appeal, failing which the appeal or the ground of appeal in question will be dismissed as inadmissible (see, inter alia, judgment of 10 July 2014, *Telefónica and Telefónica de España* v *Commission*, C?295/12 P, EU:C:2014:2062, paragraph 29 and the case-law cited).

28 Moreover, it follows from those same provisions that an appeal is inadmissible in so far as it merely repeats the pleas in law and arguments previously submitted to the General Court, including those based on facts expressly rejected by it. Such an appeal amounts in reality to no more than a request for re-examination of the application submitted to the General Court, which the Court of Justice does not have jurisdiction to undertake on appeal (see judgment of 30 May 2013, *Quinn Barlo and Others* v *Commission*, C?70/12 P, not published, EU:C:2013:351, paragraph 26 and the case-law cited).

29 By contrast, provided that the appellant challenges the interpretation or application of EU law by the General Court, the points of law examined at first instance may be discussed again in the course of an appeal. Indeed, if an appellant could not thus base his appeal on pleas in law and arguments already relied on before the General Court, an appeal would be deprived of part of its purpose (see judgment of 30 May 2013, *Quinn Barlo and Others* v *Commission*, C?70/12 P, not published, EU:C:2013:351, paragraph 27 and the case-law cited).

30 In the present case, it should be noted that it is apparent from the review of the appeal that DTS has set out clearly and precisely the paragraphs of the judgment under appeal referred to in its grounds of appeal, as well as the reasons why that judgment, in its submission, is vitiated by errors of law.

31 Moreover, contrary to what RTVE and the Kingdom of Spain submit, DTS does not merely repeat, in its appeal, the arguments made at first instance. It disputes, in fact, for the most part, the manner in which the General Court interpreted and applied EU law, in particular Article 107(1) TFEU, in holding, in the judgment under appeal, that the tax on pay-television operators for which it is liable is not an integral part of the aid granted to RTVE and, for the remainder, it accuses the General Court of having distorted the law and, accordingly, vitiated that judgment.

32 Accordingly, the appeal must be held to be admissible.

33 It is appropriate therefore, to assess the merits thereof, by examining, first, the second

ground of appeal, followed by the first and third grounds.

The second ground of appeal, alleging infringement of Article 107(1) TFEU in that the General Court failed to carry out a comprehensive review into the existence of aid and distorted Spanish law

Arguments of the parties

34 DTS and the Telefónica companies submit that the Court did not carry out a full review of the Commission's assessments as regards the conditions laid down in paragraphs 106 to 111 of the judgment of 22 December 2008, *Régie Networks* (C?333/07, EU:C:2008:764). The General Court is alleged not to have assessed the extent to which the projected amount of the revenue impacted on the calculation of the aid, distorting in that regard, in paragraphs 65 to 70 of the judgment under appeal, the national law provisions on which that Court relied in order to reach the conclusion that the amount levied in respect of the tax on pay-television operators did not influence the amount of the aid to RTVE, while failing to take account of other relevant provisions of that law.

35 First, DTS claims that, contrary to the General Court's finding in paragraph 69 of that judgment, Article 2(2) of Law No 8/2009 does not require the State, where the revenue available to RTVE is insufficient to cover the net costs of fulfilling its public service mandate, to provide resources from its general budget in order to cover those objectively determined costs. On the one hand, that provision would require the State to supplement the 'budget forecasts' for RTVE where, in implementing it, the amount of the tax revenue is below the budget forecasts. On the other hand, contributions from the general budget of the State are authorised only where expenditure exceeds the budget forecasts.

36 Furthermore, Article 2(2) of Law No 8/2009 should be read in conjunction with Article 34 of Law No 17/2006 and Article 44 of the Mandato-marco a la Corporación RTVE previsto en el artículo 4 de la Ley 17/2006 de la radio y la televisión de titularidad estatal, aprobado por los plenos del congreso de los diputados y del senado (framework mandate assigned to RTVE, provided for in Article 4 of Law No 17/2006, approved in plenary sitting by the Chamber of Deputies and the Senate) (BOE No 157 of 30 June 2008, p. 28833).

37 It is apparent from those provisions, which were not taken into account by the General Court, that RTVE itself is to set its budget, taking account not only of the projected costs of the public service obligations but also the projected revenue, including the revenue from the fiscal measures at issue. Consequently, in the event that the actual revenue from those measures is below the projected amount of the taxes and does not enable the cost of the public service budgeted for by RTVE to be covered, the State is required to supplement the 'projected budget' by means of contributions from its general budget. However, the 'projected budget' should be set on the basis of the projected amount of revenue from, in particular, the tax on pay-television operators and, consequently, that amount has a direct impact on the amount of the aid. The impact of the revenue from that tax on the implementation of the budget is therefore not to be confused with the impact of the projected amount of the revenue from that tax on the initial setting of that budget and, accordingly, on the amount of the aid.

38 The Telefónica companies further submit that there are clear indications that contradict the possibility of an alleged additional contribution from the general budget of the State; the grounds of Law No 8/2009 state, for example, that 'it does not seem reasonable that the funding guarantee should entail an increase in the contribution of the State'. Furthermore, that possibility falls within a subsidiary premiss. Under Article 2(2) of Law No 8/2009, two conditions must be met for the State to finance part of the costs of the public service obligation. First, for a given year, the revenue from

the tax on pay-television operators must be lower than the costs of carrying out the public service mandate and, secondly, the amount of the reserve fund must be insufficient to cover RTVE's costs for that year. The fact that that provision establishes a State guarantee limited in that manner, which constitutes a new aid, does not preclude the aid granted to RTVE being established on the basis of the revenue from that tax or preclude the State undertaking to make good the shortfall where the revenue from the tax is not sufficient.

39 Secondly, DTS alleges that the General Court distorted, in paragraphs 66 to 68 of the judgment under appeal, Article 33 of Law No 17/2006 and Article 8 of Law No 8/2009, relating to the role of the State where revenues from the tax on pay-television operators exceed the net costs of the public service. On the one hand, the fact that RTVE's revenue is subject to an absolute cap is irrelevant, since it is important to determine whether, subject to that cap, the amount of the aid is based on expected revenues from that tax. On the other hand, the General Court merely asserted that it is apparent from Article 8(3) of Law No 8/2009 that the excess paid to the reserve fund can be used by RTVE only with the express authorisation of the Ministry of the Economy and Finance, omitting the opening words of that provision, which state that 'the fund may be used only to offset the losses in previous years and to deal with unforeseen situations in connection with the supply of the public service'. The amount of those additional resources necessarily depends on the revenue from the taxes, since that fund is financed by those taxes.

40 The Telefónica companies submit, moreover, that the General Court misinterpreted Article 33(1) of Law No 17/2006 and Article 3(2) of Law No 8/2009 in finding that those provisions remove any link between the amount of the aid and the amount of the levies imposed on the basis of the fiscal measures at issue. The fact that the revenue may be paid to the general budget of the Spanish State is merely a subsidiary premiss. Only the revenue in excess of the limit of 10% of RTVE's annual costs is paid to the Public Treasury. Furthermore, it does not follow that the amount of the aid is independent of the amount of the tax revenue. Article 33(1) of Law No 17/2006 at most places a restriction on the amount of the aid, which does not prevent the total revenue from the tax being converted into aid within the limit set by the national legislature.

41 The Telefónica companies state that it is further apparent from various items of evidence that the State is not willing to supplement RTVE's budget. While those items of evidence are subsequent to the contested decision, they confirm the terms of the preparatory acts to Law No 8/2009, according to which 'it does not seem reasonable that the funding guarantee should entail an increase in the contribution of the State'.

42 RTVE, the Kingdom of Spain and the Commission submit that the second plea is inadmissible and, in any event, wholly unfounded.

Findings of the Court

43 It should be noted that the Court of Justice has consistently held that where the General Court has established or assessed the facts, the Court of Justice has jurisdiction, under Article 256 TFEU, solely to review the legal characterisation of those facts and the conclusions in law drawn from them. The appraisal of the facts by the General Court does not therefore constitute, save where the clear sense of the evidence produced before it is distorted, a question of law which is subject, as such, to review by the Court of Justice (see, inter alia, judgment of 3 April 2014, *France* v *Commission*, C?559/12 P, EU:C:2014:217, paragraph 78).

44 Thus, with respect to the assessment, in the context of an appeal, of the General Court's determinations on national law, the Court of Justice has jurisdiction only to determine whether that law was distorted (see judgment of 3 April 2014, *France* v *Commission*, C?559/12 P, EU:C:2014:217, paragraph 79 and the case-law cited).

45 In that regard, it should be noted that distortion must be obvious from the documents on the Court's file, without there being any need to carry out a new assessment of the facts and the evidence (judgment of 3 April 2014, *France* v *Commission*, C?559/12 P, EU:C:2014:217, paragraph 80).

46 In the present case, it should be recalled that in paragraphs 65 to 86 of the judgment under appeal, the General Court concluded, in the light of the terms of Law No 8/2009, that, as noted by the Commission, in its view, correctly, the amount of the aid to be given to RTVE does not depend on the amount of the tax levy imposed on DTS, since the amount of the aid is fixed by reference to the net costs of fulfilling RTVE's public service mandate.

47 In that regard, the General Court, on the one hand, observed in paragraph 66 of that judgment that, under Article 33 of Law No 17/2006, in the event that the income available to RTVE exceeds the costs of fulfilling its public service broadcasting mandate, the surplus is to be reallocated, in so far as it does not exceed 10% of RTVE's budgeted annual costs, to a reserve fund or the treasury. As regards the first of those situations, the General Court stated, in paragraph 67 of that judgment, that it is apparent from Article 8 of Law No 8/2009 that the capital may be used only with the express authorisation of the Ministry of the Economy and Finance and that, if it is not used within four years, it must be used to reduce the compensation to be drawn from the general budget of the Spanish State. Moreover, the General Court noted, in paragraph 68 of the same judgment, that Article 3(2) of Law No 8/2009 lays down an absolute limit on RTVE's income, which is set at EUR 1 200 million for 2010 and 2011 and that any surplus over and above that ceiling is to be directly re-allocated to the general budget of the Spanish State.

48 In the second place, in paragraphs 69, 76 and 80 of the judgment under appeal, the General Court noted that, under Article 2(2) of Law No 8/2009, in the event that the income available to RTVE is insufficient to cover the costs of fulfilling its public service broadcasting mandate, the Spanish State is required to cover the shortfall by means of contributions from its general budget.

49 In the present case, it is clear that, under the cloak of criticising the General Court for having erred in law when conducting a judicial review of the contested decision and distorted the national law provisions, while having failed to take others into consideration, DTS and the Telefónica companies are actually merely criticising the General Court's interpretation of national law in paragraphs 65 to 86 of the judgment under appeal. Their purpose is thus to substitute an alternative interpretation thereto and, accordingly, to obtain, by relying, in particular, on national provisions whose merits were not considered at first instance, a new assessment of the facts and evidence. They are not seeking to show that the General Court made findings manifestly conflicting with that national legislation or that, in relation to the items in the file, it should have given that legislation a scope which it clearly does not have.

50 In those circumstances, the second ground of appeal must be rejected as being inadmissible.

The first ground of appeal, alleging infringement of Article 107(1) TFEU owing to an incorrect interpretation of the concept of aid

The first part, alleging that the link between the tax on pay-television operators and the aid

granted to RTVE is not comparable to that between a tax of general application and exemption therefrom

– Arguments of the parties

51 DTS submits that the General Court erred in law in holding, in paragraphs 92 and 93 of the judgment under appeal, that it was seeking, by its appeal, to call into question the case-law of the Court of Justice resulting from the judgment of 20 September 2001, *Banks* (C?390/98, EU:C:2001:456). That case-law related only to the situation in which certain categories of undertakings are exempt from a tax of general application. In the present case, DTS does not object to the levying of the tax on pay-television operators on the ground that RTVE enjoys an exemption which constitutes State aid. It does claim, however, that that tax, since it was imposed on it asymmetrically in order to fund directly the aid scheme for RTVE, is itself an aid, like the tax at issue in the case which gave rise to the judgment of 7 September 2006, *Laboratoires Boiron* (C?526/04, 'the *Laboratoires Boiron* judgment', EU:C:2006:528).

52 RTVE and the Commission contend that this part of the ground of appeal is ineffective and, in any event, unfounded, a position also adopted by the Kingdom of Spain.

– Findings of the Court

53 It should be recalled that, in paragraphs 92 and 93 of the judgment under appeal, the General Court found that, by its arguments alleging infringement of Article 107(1) TFEU because of the relationship between the fiscal measures at issue and the competitive advantage enjoyed by RTVE, DTS was seeking to call into question the principle derived from the case-law of the Court, enshrined in paragraph 80 of the judgment of 20 September 2001, *Banks* (C?390/98, EU:C:2001:456), to the effect 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.

54 The complaint made by DTS with regard to those findings in the context of the first part of the first ground of appeal is incapable of leading to the judgment under appeal being set aside, since, as correctly argued by RTVE and the Commission, the General Court rejected DTS's submissions in that respect for the reasons set out not in paragraphs 92 and 93 of that judgment, but in paragraphs 94 to 105 thereof, relating to the relevance of the *Laboratoires Boiron* judgment for examination of the aid at issue, which grounds of appeal are the subject of the second part of the present plea.

55 Consequently, the first part of the first ground of appeal must be rejected as being ineffective.

The second part, alleging that the tax on pay-television operators is an asymmetrical tax constituting an aid within the meaning of the *Laboratoires Boiron* judgment

– Arguments of the parties

56 First, DTS claims that the tax on pay-television operators is an integral part of the aid granted to RTVE since it constitutes an asymmetrical tax which may be assimilated to that at issue in the *Laboratoires Boiron* judgment. That tax is imposed on a single category of operators, namely pay-television operators, which are in competition with RTVE. The aid is the consequence of the fact that, on the one hand, a competitor of the beneficiary of the aid is subject to a tax and, on the other, that the revenue generated by the tax is allocated to the funding of the aid.

57 Secondly, DTS submits that the differences identified by the General Court between the tax on pay-television operators and the tax examined in the *Laboratoires Boiron* judgment are irrelevant.

58 First of all, the fact, noted by the General Court in paragraph 100 of the judgment under appeal, that the main objective of the tax on pay-television operators is not to restore the balance of competition between RTVE and other operators is not a decisive factor. The concept of aid is an objective notion. In any event, the purpose of that tax is analogous to that of the tax at issue in the case giving rise to the *Laboratoires Boiron* judgment, since its purpose is to contribute to the financing of the costs incurred by RTVE in fulfilling its public service mandate.

59 Secondly, it is not correct to consider, as the General Court did in paragraph 101 of the judgment under appeal, that the link between the tax on pay-television operators and the aid is less narrow than the one identified in the *Laboratoires Boiron* judgment. In that regard, the General Court was wrong to find that any incompatibility of that tax with EU law would not directly call into question the aid granted to RTVE. The judgment under appeal fails to take into account that the obligation for DTS to help finance a competitor reinforces the distortion of competition resulting from the transfer of funds to the latter. RTVE thus enjoys a competitive advantage in the markets for the acquisition of audiovisual content, not only because of the funds it receives for the fulfillment of its public service mandate, but also because those funds do not benefit its competitors. The latter advantage would disappear completely if the tax on pay-television operators were abolished.

60 Thirdly, the General Court incorrectly held, in paragraphs 102 to 104 of the judgment under appeal, that, unlike the situation at issue in the case giving rise to the *Laboratoires Boiron* judgment, the amount of the aid granted to RTVE is not determined by the amount of the tax on pay-television operators. In the present case, the competitive advantage enjoyed by RTVE increases with the amount of that tax imposed on DTS, since, the greater that tax, the less resources it will have to compete with RTVE. The link between that tax and the aid is thus narrower than that identified in the *Laboratoires Boiron* judgment. In the contested decision, the Commission arrived at the conclusion that the transfer of public funds to RTVE constitutes State aid, within the meaning of Article 107(1) TFEU.

61 The Telefónica companies submit, first of all, that the General Court erred in law in interpreting restrictively the conditions that must be satisfied in order for the method of financing of an aid to form an integral part of that aid, since the rules should be given a teleological interpretation.

62 Second, the Telefónica companies argue that the conditions laid down by the case-law of the Court of Justice for the purpose of establishing that a fiscal measure is part of an aid, namely the hypothecation of the tax to the funding of the aid in question and the direct impact of the revenue from the tax on the amount of the aid, are not separate and cumulative conditions. The hypothecation itself implies the existence of a necessary link between the amount of revenue and the aid. The General Court thus misinterpreted the judgment of 13 January 2005, *Streekgewest* (C?174/02, EU:C:2005:10), since, in that judgment, the Court examined only whether the tax was necessarily hypothecated to the aid under the relevant national rules and considered that, if so, the direct impact of the fiscal measure on the amount of the aid was a logical consequence.

63 Thirdly, the Telefónica companies submit that the interpretation adopted by the General Court in the judgments of 21 October 2003, *van Calster and Others* (C?261/01 and C?262/01, EU:C:2003:571), and of 27 November 2003, *Enirisorse* (C?34/01 to C?38/01, EU:C:2003:640), is incorrect. The fact that the Court did not rule on the requirement that the fiscal measure must have

a direct impact on the amount of the aid did not mean that it considered that that requirement was an additional condition for determining whether the method of financing of the aid is part thereof, but may be explained by the fact that those judgments were delivered in the first cases in which the Court ruled on the question of inseparability.

64 RTVE, the Kingdom of Spain and the Commission submit that the second part of the first ground of appeal is unfounded.

– Findings of the Court

65 It is settled case-law of the Court that taxes do not fall within the scope of the provisions of the Treaty relating to State aid unless they constitute the method of financing an aid measure, so that they form an integral part of that measure (judgments of 13 January 2005, *Streekgewest*, C?174/02, EU:C:2005:10, paragraph 25; of 13 January 2005 in *Pape*, C?175/02, EU:C:2005:11, paragraph 14; and of 27 October 2005, *Distribution Casino France and Others*, C?266/04 to C?270/04, C?276/04 and C?321/04 to C?325/04, EU:C:2005:657, paragraph 34).

66 Firstly, an aid, in the strict sense, may not substantially affect trade between Member States and thus be deemed admissible, but could have its disruptive effect exacerbated by a method of financing that would make the whole incompatible with the internal market. Furthermore, where a tax 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 (see, to that effect, judgment of 21 October 2003, *van Calster and Others*, C?261/01 and C?262/01, EU:C:2003:571, paragraphs 47 and 48 and the case-law cited).

67 The method by which aid is financed may render the entire aid scheme it is intended to fund incompatible with the internal market. As a result, the aid cannot be considered separately from its method of financing (see, to that effect, judgment of 14 April 2005, *AEM and AEM Torino*, C?128/03 and C?129/03, EU:C:2005:224, paragraph 45).

68 According to settled case-law, in order 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 tax is necessarily allocated to the financing of the aid and has a direct impact on the amount of the aid and, consequently, on the assessment of the compatibility of that aid with the internal market (see, inter alia, judgments of 15 June 2006, *Air Liquide Industries Belgium*, C?393/04 and C?41/05, EU:C:2006:403, paragraph 46 and the case-law cited, and of 22 December 2008, *Régie Networks*, C?333/07, EU:C:2008:764, paragraph 99).

69 In the present case, the General Court found, in paragraphs 65 to 86 of the judgment under appeal, criticised in vain in the second ground of appeal, that it is clear from the applicable national law provisions that the amount of aid allocated to RTVE does not directly depend on the revenue from the fiscal measures at issue, since the amount thereof is determined on the basis of the net costs relating to the fulfilment of the public service mandate entrusted to RTVE.

70 In particular, as is apparent from paragraphs 47 and 48 of the present judgment, the General Court noted, in that regard, that when the tax revenues available to RTVE exceed the costs of fulfilling the latter’s public service mandate, the excess must be reassigned, as appropriate, to a reserve fund or the treasury, since those revenues, in addition, are subject to an absolute limit, with the result that any surplus is also reassigned to the State’s general budget. Moreover, the General Court found that, where those revenues are insufficient to cover these costs, the Spanish State is required to make up the difference.

71 In those circumstances, although it is common ground that the financing of the aid granted

to RTVE is ensured by the fiscal measures at issue, the General Court, contrary to what DTS and the Telefónica companies submit, was nevertheless entitled to conclude, without committing an error of law, in paragraph 104 of the judgment under appeal, that those fiscal measures do not form part of the aid.

72 Since the revenue from the fiscal measures at issue has no direct impact on the amount of the aid granted to RTVE, given that neither the grant or the amount of the aid are based on that revenue and that the revenue from that aid is not used to finance it, in that part of the revenue may be reallocated to other purposes, it cannot be held that those tax measures are hypothecated to the aid in question.

73 It is irrelevant, in that regard, that the fiscal measures at issue were introduced in order to offset the loss of the commercial revenues formerly enjoyed by RTVE, in particular those derived from advertising (see, by analogy, judgment of 13 January 2005, *Streekgewest*, C?174/02, EU:C:2005:10, paragraph 27).

74 DTS's line of argument, based on the *Laboratoires Boiron* judgment, is not such as to call into question those findings.

75 In that regard, it should be recalled that, in that judgment, the Court held, in essence, that, in the case of asymmetrical tax liability, that is where only one of two categories of competing traders is liable to pay a tax, traders liable to pay the tax may plead the illegality of it. In such a case, the aid derives from the fact that another category of economic operators with which the category liable to pay the tax is in direct competition is not liable for that charge. The aid measure is therefore the tax itself, that tax and the aid constituting two elements of one and the same fiscal measure which are inseparable. That situation is thus not comparable to that of any exemption from a tax of general application from which that tax may be distinguished (see, to that effect, *Laboratoires Boiron* judgment, paragraphs 30 to 48).

76 The General Court did not err in law in finding, in paragraphs 98 to 103 of the judgment under appeal, that the tax on pay-television operators for which DTS is liable is not comparable to the asymmetrical tax at issue in the case which gave rise to the *Laboratoires Boiron* judgment.

77 In the present case, the fiscal measures at issue and the aid to RTVE do not constitute, as noted by the General Court in paragraph 101 of the judgment under appeal, two elements of one and the same fiscal measure which are inseparable, since, unlike the situation at issue in the case giving rise to the *Laboratoires Boiron* judgment, the possible inapplicability of the fiscal measures at issue because of their possible incompatibility with EU law does not directly entail the calling into question of the aid, since, as is apparent from paragraphs 48 and 70 of the present judgment, the Spanish State is required to cover the shortfall between the sources of funding available to RTVE and all of the costs incurred by RTVE in carrying out its public service obligations.

78 In addition, and as also correctly noted by the General Court in paragraph 102 of the judgment under appeal, in the case giving rise to the *Laboratoires Boiron* judgment, the amount of the aid was determined only by the amount of the tax, since the benefit which the beneficiaries derived from the liability of their competitors to that tax necessarily depended on the amount of that tax. However, in the present case, the amount of the aid is determined, as is apparent from paragraphs 69 to 71 of the present judgment, by the net costs of fulfilling the public service mandate.

79 Admittedly, as correctly noted by DTS, in the present case, the tax on pay-television operators is also intended to finance an aid scheme in favour of RTVE which the Commission found to be constitutive of State aid, within the meaning of Article 107(1) TFEU. The obligation to

pay that tax thus causes DTS an additional competitive disadvantage on the markets on which it operates in competition with RTVE, since the latter is not liable to pay such a tax.

80 However, as the General Court correctly pointed out, in paragraphs 84 and 102 of the judgment under appeal, that fact alone is not sufficient to demonstrate that such a tax is an integral part of the aid.

81 On the one hand, as the Court has already held, the question whether a tax is an integral part of an aid financed by a tax depends not on the existence of a competitive relationship between the person liable to pay the tax and the beneficiary of the aid, but only on whether that tax is hypothecated to the aid in question under the relevant national legislation (see, to that effect, judgment of 22 December 2008, *Régie Networks*, C?333/07, EU:C:2008:764, paragraphs 93 to 99).

82 Thus, according to the case-law of the Court, a tax cannot be hypothecated to an exemption from payment of that same tax for a category of undertakings, and thus even where those undertakings operate in competition with undertakings liable to pay the tax in question. The application of a tax exemption and its extent do not depend on the tax revenue. Thus, those liable to pay a charge cannot rely on the argument that the exemption enjoyed by other undertakings constitutes State aid in order to avoid payment of that charge or to obtain reimbursement thereof (see, to that effect, inter alia, judgment of 27 October 2005, *Distribution Casino France and Others* , C?266/04 to C?70/04, C?276/04 and C?321/04 to C?325/04, EU:C:2005:657, paragraphs 41 and 42).

83 On the other hand, as has already been stated in paragraph 65 of the present judgment, taxes are not, in principle, subject to the rules on State aid. As noted by the Advocate General in point 96 of his Opinion, DTS’s argument, if followed, would lead to the conclusion that any tax levied at sectoral level and imposed on undertakings in competition with the beneficiary of the aid financed by the tax must be examined under Articles 107 and 108 TFEU.

84 It follows from the foregoing that the General Court did not err in law in holding that the tax on pay-television operators is not part of the aid scheme benefiting RTVE.

85 Consequently, the second part of the first ground of appeal must be rejected as being unfounded.

The third ground of appeal, alleging an error of law in the application of Article 106(2) TFEU

Arguments of the parties

86 DTS submits that the General Court distorted, in the judgment under appeal, the basis of the second plea seeking annulment raised at first instance, alleging infringement of Article 106(2) TFEU. Contrary to what the General Court held in paragraphs 151 and 152 of that judgment, it did not, before that court, rely on any argument relating to the effects of the aid itself granted to RTVE, but only argued that the method of financing that aid aggravated the distortion of competition resulting therefrom and made the whole, composed of the aid and that method of financing, incompatible with the common interest. The General Court, in that regard, incorrectly interpreted several of its arguments.

87 According to DTS, that distortion led the General Court to rule *ultra petita*, thus altering the subject matter of the dispute. Having itself clarified during the hearing before the General Court that the second plea for annulment was effective only in the event that the first plea was upheld, the General Court, in dismissing that plea, could not examine the second plea. In any event, even

supposing that the General Court was able to rule on that plea, it was entitled to reject it only for the reason set out in paragraph 151 of the judgment under appeal, to the effect that the Commission was not obliged to take into account the effects of the tax on pay-television operators, since that fiscal measure was not an integral part of the aid. The General Court altered the subject matter of the dispute, however, by reinterpreting the second plea raised before it, in paragraph 152 of the judgment, as relating to the effects of the aid itself.

88 In so doing, the General Court, according to DTS, exceeded the limits of its jurisdiction relating to the judicial review of the assessments made by the Commission in respect of the principle of proportionality set out in Article 106(2) TFEU. The General Court, as part of that review, only has jurisdiction to check whether the Commission made a manifest error of assessment, without having the power to substitute its assessment for that of the Commission, nor, a fortiori, to assess issues that the Commission did not assess. Thus, the General Court, having confirmed the Commission's decision that the tax on pay-television operators is not an integral part of the aid, could only find that the Commission was entitled to authorise the aid in question. It could not, however, rule on issues such as the risk of anticompetitive behaviour by RTVE, in particular, the raising of bids, since the Commission did not examine such questions.

89 RTVE contends that the third plea is inadmissible. In any event, it considers, like the Kingdom of Spain and the Commission, that that plea is ineffective or, at the very least, unfounded.

Findings of the Court

90 It should be noted that the third ground of appeal rests entirely on the premiss that the General Court misinterpreted the scope of the second plea for annulment raised at first instance alleging infringement of Article 106(2) TFEU.

91 It should be noted, however, that, by its appeal, DTS does not dispute any of the assessments made by the General Court, in paragraphs 113 to 167 of the judgment under appeal, in order to justify the rejection of that second plea.

92 In particular, DTS in no way claims that that part of the judgment under appeal is vitiated by errors of law; it states at the outset that its appeal does not relate to the review of the compatibility of the aid granted to RTVE with Article 106(2) TFEU.

93 It follows that the third ground of appeal, even if it were founded, is in no way capable of leading to the annulment of the judgment under appeal.

94 In those circumstances, that ground of appeal must be rejected as ineffective.

The pleas submitted by the Telefónica companies alleging the infringement of Article 40 of the Statute of the Court of Justice of the European Union and Article 106(2) TFEU

95 In their reply, the Telefónica companies raised a plea alleging infringement of Article 40 of the Statute of the Court of Justice, in which they submit that the General Court erred in law in rejecting as inadmissible their argument relating to the infringement of Article 108 TFEU.

96 The Telefónica companies also raised, in that pleading, a plea alleging infringement of Article 106(2) TFEU, in which they argue that the General Court erred in law in conducting an excessively limited review of whether the aid scheme at issue complied with the principle of proportionality, relying in that regard on the Commission's discretion.

97 It is not disputed that those pleas seek annulment of the judgment under appeal on grounds

that were not raised by DTS as part of its appeal.

98 On the one hand, DTS did not rely on the infringement of Article 40 of the Statute of the Court of Justice of the European Union in support of its appeal. On the other, although the third ground of appeal formally relies on the infringement of Article 106(2) TFEU, DTS itself stated in its appeal, as is apparent from paragraph 92 of the present judgment, that it is not seeking to challenge the review of the compatibility of the aid granted to RTVE under that provision, merely alleging, as part of that ground of appeal, that the General Court distorted some of its arguments.

99 Under Article 174 of the Rules of Procedure, a response shall seek to have the appeal allowed or dismissed, in whole or in part.

100 Furthermore, in accordance with Article 172 of those rules, a party to the relevant case before the General Court may submit, by document separate from the response, a cross-appeal which, according to Article 178(1) and (3), second sentence, of the Rules of Procedure, must seek to have set aside, in whole or in part, the judgment under appeal on the basis of pleas in law and arguments separate from those relied on in the response.

101 It is apparent from those provisions, read together, that the reply may not seek the annulment of the judgment under appeal on the basis of distinct and independent grounds from those raised in the appeal, since such grounds may only be raised as part of a cross-appeal.

102 Accordingly, the Court rejects as inadmissible the pleas submitted by the Telefónica companies alleging the infringement of Article 40 of the Statute of the Court of Justice of the European Union and Article 106(2) TFEU.

The cross-appeal

103 In support of its cross-appeal, the Telefónica companies rely on a single plea, alleging infringement of Article 40 of the Statute of the Court of Justice, in that the General Court rejected as inadmissible their argument relating to an infringement of Article 108 TFEU.

Arguments of the parties

104 The Telefónica companies maintain that the General Court was not entitled to reject as inadmissible the pleas for annulment which they raised at first instance, alleging infringement of Article 108 TFEU on the ground that, since they were raised for the first time in the statement in intervention, they were unconnected with the subject matter of the dispute.

105 First of all, in paragraph 216 of the judgment under appeal, the General Court was not entitled to rely on the judgment of 19 November 1998, *United Kingdom* v *Council* (C?150/94, EU:C:1998:547), since the Telefónica companies did not refer to that judgment.

106 Furthermore, in paragraph 217 of the judgment under appeal, the General Court does not explain how the judgment of 8 July 2010, *Commission* v *Italy* (C?334/08, EU:C:2010:414), entails that the intervener taking part in infringement proceedings has more freedom than the intervener in an action for annulment when it intends to raise pleas not relied on by the main party. If the intervener were required to confine itself to the pleas put forward by the main party, Article 132(2) of the Rules of Procedure, under which the intervener is required to set out its pleas in law, would be rendered meaningless.

107 RTVE contends that the cross-appeal is inadmissible. On the one hand, that appeal is based, in breach of the second sentence of Article 178(3) of the Rules of Procedure, on a single plea that is identical to one of the pleas relied on by the Telefónica companies in their reply to the

appeal in the main proceedings. Moreover, that cross-appeal does not clearly identify, in breach of the first sentence of the same provision, the grounds of the judgment under appeal which are in dispute. In any event, the cross-appeal is unfounded. The Kingdom of Spain and the Commission also submit that the arguments of the Telefónica companies must be dismissed.

Findings of the Court

Admissibility of the cross-appeal

108 Regarding the admissibility of the cross-appeal, it should be recalled that, pursuant to the second sentence of Article 178(3) of the Rules of Procedure, the pleas and legal arguments put forward in support of a cross-appeal must, as already stated in paragraph 100 of the present judgment, be distinct from those relied on in the reply relating to the appeal in the main proceedings.

109 In the present case, it appears that, admittedly, the single plea raised by the Telefónica companies in support of their cross-appeal, alleging infringement of Article 40 of the Statute of the Court of Justice of the European Union, corresponds exactly to one of the arguments raised in the reply to the appeal in the main proceedings brought by DTS.

110 However, under penalty of falling foul of the distinction made by the Rules of Procedure between the appeal in the main proceedings and the cross-appeal, the requirement laid down by the second sentence of Article 178(3) of those rules may be understood only as being based on the premiss that the pleas and arguments set out in the reply are, themselves, analogous to those raised in the appeal in the main proceedings.

111 In the present case, as is apparent from paragraphs 95 to 102 of the present judgment, the plea put forward by the Telefónica companies in their reply relating to the appeal in the main proceedings brought by DTS, alleging infringement of Article 40 of the Statute of the Court of Justice of the European Union, is inadmissible because it is distinct from those of the appeal.

112 As regards compliance with the requirement laid down by the first sentence of Article 178(3) of the Rules of Procedure, it is sufficient to note that the cross-appeal expressly refers to paragraphs 207 to 218 of the judgment under appeal and, therefore, that it does clearly identify the grounds of that judgment which are in dispute.

113 In those circumstances, it must be held that the cross-appeal is admissible in that it refers to paragraphs 207 to 218 of the judgment under appeal.

Substance

114 With respect to whether the cross-appeal is well founded, it should be recalled that a party who, pursuant to Article 40 of the Statute of the Court of Justice of the European Union, is granted leave to intervene in a case submitted to the Court may not alter the subject matter of the dispute as defined by the forms of order sought and the pleas in law raised by the main parties. It follows that arguments submitted by an intervener are not admissible unless they fall within the framework provided by those forms of order and pleas in law (judgment of 7 October 2014, *Germany* v *Council* , C?399/12, EU:C:2014:2258, paragraph 27).

115 In the present case, the Telefónica companies allege, in the single plea of their cross-appeal, that the General Court dismissed as inadmissible, in paragraphs 207 to 218 of the judgment under appeal, the pleas, raised in their statement in intervention before the General Court, in which they alleged that the Commission infringed Article 108 TFEU.

116 It is not disputed that DTS did not rely on the infringement of that provision in support of its action at first instance, since the three pleas it relied on in order to seek annulment of the contested decision alleged the infringement, respectively, of Article 107 TFEU, Articles 49 and 64 TFEU and Article 106(2) TFEU.

117 It follows that, as the General Court held in paragraph 212 of the judgment under appeal, the pleas put forward by the Telefónica companies in its statement in intervention before the General Court were wholly unconnected with the subject matter of the dispute as it had been defined by DTS and altered the framework of the dispute to a degree which was contrary to Article 40 of the Statute of the Court of Justice of the European Union.

118 In that regard, the General Court correctly held, in paragraph 217 of the judgment under appeal, that the solution adopted in the judgment of 8 July 2010, *Commission* v *Italy* (C?334/08, EU:C:2010:414), in the context of infringement proceedings under Article 260 TFEU, could not be transposed to an action for annulment under Article 263 TFEU.

119 Infringement proceedings are based on the objective finding that a Member State has failed to fulfil its obligations under EU law (see, in particular, judgment of 6 October 2009, *Commission* v *Spain*, C?562/07, EU:C:2009:614, paragraph 18).

120 It follows that, as the General Court correctly held in paragraph 217 of the judgment under appeal, in the context of such proceedings, the Court must make all the necessary determinations in order to reach a finding of a failure to fulfil obligations, with the result that a plea in defence, raised by an intervener, which relates to an element of fact or law that the Commission must necessarily take account of in its analysis is not capable of altering the framework of the dispute, even if it was not relied on by the Member State concerned. In contrast, an action for annulment is defined in particular by the pleas in law relied on by the applicant.

121 Moreover, although, under Article 132(2)(b) of the Rules of Procedure, the statement in intervention is to contain the pleas in law and arguments relied on by the intervener, that does not mean that the intervener is free to rely on new pleas in law, distinct from those relied on by the applicant. As noted by the Advocate General in point 219 of his Opinion, that provision falls within the context of the limits established by the intervention procedure and must be read in the light of Article 129 of that regulation, which states that the intervention is to be limited to supporting, in whole or in part, the form of order sought by one of the parties, that it is ancillary to the main proceedings and that the intervener must accept the case as he finds it at the time of his intervention.

122 As to the Telefónica companies' complaint that the General Court referred, in paragraph 216 of the judgment under appeal, to the judgment of 19 November 1998, *United Kingdom* v *Council* (C?150/94, EU:C:1998:547), it is sufficient to state that it is completely ineffective, since it is not such as to vitiate the judgment under appeal by an error of law; those companies do not, moreover, argue that the assessment carried out by the General Court in that paragraph is legally flawed.

123 Consequently, the single plea raised in the cross-appeal must be rejected as unfounded.

Costs

124 In accordance with the first paragraph of Article 184(2) of the Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to costs. Under Article 138(1) of those rules, applicable, mutatis mutandis, to appeal proceedings by virtue of Article 184(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

125 Since DTS has been unsuccessful and the Commission has applied for costs, it should be ordered to bear, in addition to its own costs, those incurred by the Commission in the appeal in the main proceedings.

126 As regards the cross-appeal, since the Telefónica companies have been unsuccessful and the Commission has applied for costs, they must also be ordered to bear their own costs and to pay the costs incurred by the Commission in relation to their cross-appeal.

127 In accordance with Article 184(4) of the Rules of Procedure, the Telefónica companies shall bear their own costs in respect of the appeal in the main proceedings, while RTVE shall bear its own costs in respect of the appeal in the main proceedings and the cross-appeal.

128 Pursuant to Article 140(1) of those rules, which applies, mutatis mutandis, to the procedure on appeal by virtue of Article 184(1) of those rules, the Member States which intervene in the proceedings are to bear their own costs. In accordance with those provisions, the Kingdom of Spain shall bear its own costs.

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

1. **Dismisses the appeal;**

2. **Orders DTS Distribuidora de Televisión Digital SA to bear its own costs and to pay those incurred by the European Commission in respect of the appeal in the main proceedings;**

3. **Orders Telefónica de España SA and Telefónica Móviles España SA to bear their own costs and to pay those incurred by the European Commission in respect of the cross-appeal;**

4. **Orders Corporación de Radio y Televisión Española SA (RTVE) and the Kingdom of Spain to bear their own costs.**

[Signatures]

* Language of the case: Spanish.