Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

13 February 2014*

(Request for a preliminary ruling — State aid — Subsidised purchase or renting of digital decoders — Commission decision declaring an aid scheme unlawful and incompatible with the internal market — Recovery — Quantification of the amount to be recovered — Role of the national court — Taking into consideration by the national court of the positions of the Commission in the enforcement of its decision — Principle of cooperation in good faith)

In Case C-69/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale civile di Roma (Italy), made by decision of 19 November 2012, received at the Court on 11 February 2013, in the proceedings

**Mediaset SpA**

v

**Ministero dello Sviluppo economico,**

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, J.L. da Cruz Vilaça, G. Arestis, J.-C. Bonichot and A. Arabadjiev (Rapporteur), Judges,

Advocate General: N. Jääskinen,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 21 November 2013,

after considering the observations submitted on behalf of:

— Mediaset SpA, by L. Medugno, A. Lauteri, G. Rossi, G.M. Roberti, M. Serpone and I. Perego, avvocati,

— the Italian Government, by G. Palmieri, acting as Agent, and A. De Stefano, avvocato dello Stato,

— the Polish Government, by B. Majczyna, acting as Agent,

— the European Commission, by D. Grespan, B. Stromsky and G. Conte, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

* Language of the case: Italian.

gives the following

## Judgment

1 This request for a preliminary ruling concerns the interpretation of the relevant provisions of the European Union law on State aid.

2 The request has been made in proceedings between Mediaset SpA ('Mediaset') and the Ministero dello Sviluppo economico (Ministry for Economic Development; 'the Ministry') concerning the recovery of the State aid which the Italian Republic granted to Mediaset as part of an aid scheme for digital terrestrial broadcasters offering pay-TV services and cable pay-TV operators, declared incompatible with the internal market by Commission Decision 2007/374/EC of 24 January 2007 on State aid C 52/2005 (ex NN 88/2005, ex CP 101/2004) implemented by the Italian Republic for the subsidised purchase of digital decoders (OJ 2007 L 147, p. 1; 'Decision 2007/374').

## Legal context

### Regulation (EC) No 659/1999

3 Article 14 of Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1), entitled 'Recovery of aid', states:

'1. Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the recipient (hereinafter referred to as a "recovery decision"). The Commission shall not require recovery of the aid if this would be contrary to a general principle of [European Union] law.

2. The aid to be recovered pursuant to a recovery decision shall include interest at an appropriate rate fixed by the Commission. Interest shall be payable from the date on which the unlawful aid was at the disposal of the recipient until the date of its recovery.

3. Without prejudice to any order of the Court of Justice [of the European Union] pursuant to Article [278 TFEU], recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission's decision. To this effect and in the event of a procedure before national courts, the Member States concerned shall take all necessary steps which are available in their respective legal systems, including provisional measures, without prejudice to [European Union] law.'

### Decision 2007/374

4 Article 1 of Decision 2007/374 provides:

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

5 Article 2 of that decision provides:

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

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of this Decision. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the recipient until their recovery.

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

6 Article 3 of that decision states:

'The Italian Government shall inform the Commission, within two months from the date of notification of this decision, of the measures taken to comply herewith. It will provide this information using the questionnaire attached to this Decision.

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

7 With regard to the amounts of aid to be recovered, the Commission has stated, in recitals 191 to 193 in the preamble to Decision 2007/374, as follows:

'(191) As regards establishing what should be recovered from broadcasters, the Commission acknowledges that accurately calculating the amount of State resources that has actually benefited the recipients is fairly complex. This is because not only was the aid granted indirectly via the consumers but also it was linked to the equipment needed to receive the broadcasters' services rather than the services themselves.

(192) However, according to the case-law of the Court …, no provision of Community law requires the Commission, when ordering the recovery of aid declared incompatible with the common market, to fix the exact amount of the aid to be recovered. It is sufficient for the Commission's decision to include information enabling the recipient to work out himself, without overmuch difficulty, that amount …

(193) The Commission therefore considers that it is worth giving some guidelines on how the advantage should be quantified. In its view, because of the special characteristics of this case, a suitable method would be to determine the amount of additional profits generated by the new digital services and pay-TV or pay-per-view offers as a result of the measure in question.'

8 In recitals 196 to 205 in the preamble to that decision, the Commission has provided details of the method referred to in recital 193 in order to enable the Italian Republic to determine the exact amounts to be recovered.

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

9 Following the adoption of Decision 2007/374, the Commission and the Italian Republic had exchanges concerning the identification of the individual recipients under the aid scheme declared unlawful and the quantification of the exact amounts to be recovered.

10 In particular, by letter of 1 April 2008, the Commission approved the method used by the Italian Republic, namely a consumer survey carried out by Ipsos, to ascertain the number of additional users resulting from the aid in question, the average revenue per user and the additional revenues. The Commission also agreed with the findings of the Italian Republic that TIMedia and Fastweb,

recipients of the aid in question, did not have to be made subject to the repayment obligation since the analyses carried out showed that those undertakings made no additional profits during the period in which the aid in question was granted. However, in the same letter, the Commission reserved its position as regards the avoidable costs borne by Mediaset and stated, in consequence, that the amount of aid to be recovered from Mediaset was EUR 6 844 361.

11 By letter of 11 June 2008, after new facts had been brought to its attention by the Italian Republic, the Commission approved the new calculation of the avoidable costs made by that Member State in respect of Mediaset, the amount of aid to be recovered from Mediaset thus being EUR 4 926 543.22.

12 By letter of 23 October 2009, following a fresh submission of additional information by the Italian Republic, the Commission disagreed with the new econometric model used by that Member State on the ground that it referred to different periods for allocation of the costs and revenues and that a similar method had already been rejected by that Member State itself. The Commission also stated in that letter that, if the Italian Republic were not immediately to recover the aid in question from Mediaset, it could have recourse to the procedure laid down in Article 88(2) EC.

13 By an order of 12 November 2009, the Italian authorities ordered Mediaset to pay the overall amount of EUR 5 969 442.12, which included the interest calculated in accordance with the procedure laid down in Article 14(2) of Regulation No 659/1999.

14 On 11 December 2009, after having paid the amount required by the Italian authorities, Mediaset brought an action before the Tribunale civile di Roma (Civil District Court, Rome) seeking the annulment of that order and the reduction of the sum to be recovered, relying in particular on the incorrect application of the quantification criteria laid down in Decision 2007/374 and the inaccuracy of the calculations to determine the additional profit generated by the aid in question. In addition, Mediaset asked that an order be made that an expert legal report be obtained.

15 In the interim, Mediaset had brought an action for annulment against Decision 2007/374 before the General Court of the European Union. That action was dismissed by the General Court by its judgment in Case T-177/07 *Mediaset* v *Commission* [2010] ECR II-2341. Mediaset filed an appeal against that judgment, which was dismissed by the Court of Justice in Case C-403/10 P *Mediaset* v *Commission*.

16 In the main proceedings, the Tribunale civile di Roma ordered an expert legal report, the findings of which, given on 6 September 2011 by the board of experts, contain criticisms of both the consumer survey used to calculate the number of additional viewers attracted to the pay-per-view television offer and the new digital channels and the econometric models proposed and used by the parties to the main proceedings. The report also concludes that it is not shown that the presence of the aid in question actually influenced the sales of decoders during the period examined. By its observations dated 17 July 2012, the Ministry disputed the findings of the report.

17 In those circumstances, the Tribunale civile di Roma decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Is the national court called upon to rule on the amount of State aid which the Commission has ordered to be recovered bound, as regards both the existence of the State aid and its amount, by [Decision 2007/374], as supplemented by the determinations which the Commission made in its [letters of 11 June 2008 and 23 October 2009] and as confirmed by [the judgment of the General Court in *Mediaset* v *Commission*]?

If the first question should be answered in the negative:

2. In affirming in its judgment [in *Mediaset* v *Commission*] that it is for the national court to rule on the amount of the State aid, did the [General Court] intend to restrict that power to the quantification of an amount which, inasmuch as it relates to State aid actually implemented and received, must necessarily have a positive value and cannot therefore be nil; or

3. Did the [General Court], in affirming in its judgment [in *Mediaset* v *Commission*] that it is for the national court to rule on the amount of the State aid, instead mean to ascribe to the national court the power to assess the claim for the recovery of State aid in so far as concerns both the existence of the State aid and its quantum and also, therefore, the power to hold that there is no obligation to repay aid?'

## Consideration of the questions referred

### *The first question*

18 By its first question, the referring court asks, in essence, whether, in order to ensure that a Commission decision declaring an aid scheme unlawful and incompatible with the internal market and ordering the recovery of the aid in question, but not identifying the individual recipients of that aid and not determining the precise amounts to be recovered is executed, the national court is not only bound by that decision but also by the positions adopted by that institution in the execution of that decision which, for their part, state the exact amount of aid to be recovered from a particular recipient.

19 In that regard, it must be borne in mind that the implementation of that system of control is a matter for both the Commission and the national courts, their respective roles being complementary but separate (see Case C-284/12 *Deutsche Lufthansa* [2013] ECR, paragraph 27 and the case-law cited).

20 Under that system, assessment of the compatibility of aid measures with the internal market falls within the exclusive competence of the Commission, subject to review by the Courts of the European Union (see, to that effect, Joined Cases C-261/01 and C-262/01 *van Calster and Others* [2003] ECR I-12249, paragraph 75; Case C-368/04 *Transalpine Ölleitung in Österreich* [2006] ECR I-9957, paragraph 38; and *Deutsche Lufthansa*, paragraph 28).

21 In accordance with settled case-law, no provision of European Union law requires the Commission, when it orders restitution of aid declared incompatible with the internal market, to fix the precise amount of the aid to be repaid. It is sufficient for the Commission's decision to include information enabling the recipient to work out himself, without overmuch difficulty, that amount (see, to that effect, Case C-480/98 *Spain* v *Commission* [2000] ECR I-8717, paragraph 25; *Mediaset* v *Commission*, paragraph 126; and Case C-81/10 P *France Télécom* v *Commission* [2011] ECR I-12899, paragraph 102).

22 The Commission, when it is faced with an aid scheme, is generally not in a position to identify exactly the amount of aid received by individual recipients. Accordingly, the specific circumstances of one of the recipients of an aid scheme can be assessed only at the stage of recovery of the aid (see, to that effect, Case C-310/99 *Italy* v *Commission* [2002] ECR I-2289, paragraphs 89 to 91).

23 In addition, it must be noted that, pursuant to the fourth paragraph of Article 288 TFEU, decisions are binding in their entirety upon those to whom they are addressed. Consequently, the Member State to which a decision requiring recovery of unlawful aid incompatible with the internal market is addressed is obliged under that article to take all measures necessary to ensure implementation of that decision (see, to that effect, Case C-209/00 *Commission* v *Germany* [2002] ECR I-11695, paragraph 31, and Case

C-404/00 *Commission* v *Spain* [2003] ECR I-6695, paragraph 21). Those decisions are binding on all the organs of the State to which they are addressed, including the courts of that State (see, to that effect, Case 249/85 *Albako Margarinefabrik* [1987] ECR 2345, paragraph 17).

24 Although Decision 2007/374, which became final following the judgment of the Court in *Mediaset* v *Commission*, is accordingly binding on the Italian Republic to which it was addressed and must, on that basis, be regarded as binding the national court, the same cannot be said of the letters sent subsequently by the Commission to the Italian Republic as part of the exchanges to ensure the immediate and effective execution of that decision.

25 In that regard, it must be pointed out that those letters, and in particular those dated 11 June 2008 and 23 October 2009 which identify Mediaset as a recipient of the aid scheme at issue and specify an exact amount of aid to be recovered from it, do not constitute decisions within the meaning of the fourth paragraph of Article 288 TFEU.

26 In addition, it is clear that such statements of position are not acts which can be adopted on the basis of Regulation No 659/1999.

27 Moreover, the Commission has itself accepted, in its observations, that its statements of position were not intended to supplement or amend the content of Decision 2007/374 and that they were devoid of any binding effect.

28 Consequently, the statements of position made by the Commission in the context of the execution of Decision 2007/374 cannot be regarded as being binding on the national court.

29 That being so, it must be borne in mind that application of the European Union competition rules is based on an obligation of cooperation in good faith between the national courts, on the one hand, and the Commission and the European Union Courts, on the other, in the context of which each acts on the basis of the role assigned to it by the Treaty on the Functioning of the European Union. In the context of that cooperation, national courts must take all the necessary measures, whether general or specific, to ensure fulfilment of the obligations under European Union law and refrain from those which may jeopardise the attainment of the objectives of the Treaty, as follows from Article 4(3) TEU (see *Deutsche Lufthansa*, paragraph 41).

30 Thus, where the national court entertains doubts or has difficulties as regards the quantification of the amount of aid to be recovered, it remains open to it to contact the Commission for assistance in accordance with the principle of cooperation in good faith, as is apparent in particular from paragraphs 89 to 96 of the Commission notice on the enforcement of State aid law by national courts (OJ 2009 C 85, p. 1).

31 Accordingly, although the statements of position by the Commission cannot bind the national court, it must be noted that, to the extent that those statements of position, as well as the Commission opinions which may be sought by the national court in the circumstances set out in the paragraph above, are intended to facilitate the accomplishment of the task of the national authorities in the immediate and effective execution of the recovery decision and, having regard to the principle of cooperation in good faith, the national court must take them into account as a factor in the assessment of the dispute before it and must state reasons having regard to all the documents in the file submitted to it.

32 In the light of all the foregoing considerations, the answer to the first question is that although, in order to ensure that a Commission decision declaring an aid scheme unlawful and incompatible with the internal market and ordering the recovery of the aid in question, but not identifying the individual recipients of that aid and not determining the precise amounts to be recovered is executed, the national court is bound by that decision, it is not, however, bound by the positions adopted by that

institution in the execution of that decision. Nevertheless, under the principle of cooperation in good faith laid down in Article 4(3) TEU, the national court must take the statements of position into account as a factor in the assessment of the dispute before it.

*The second and third questions*

33 By its second and third questions, which it is appropriate to consider together, the referring court asks, in essence, whether the national court, when determining the exact amounts of aid to be recovered and where the Commission, in its decision declaring an aid scheme unlawful and incompatible with the internal market, has not identified the individual recipients of the aid in question or determined the precise amounts to be repaid, may conclude that the amount of aid to be repaid is zero where that follows from the calculations made on the basis of all the relevant information of which it has been made aware.

34 It must be borne in mind that, in accordance with settled case-law, in the absence of pertinent provisions of European Union law, the recovery of aid which has been declared incompatible with the internal market is to be carried out in accordance with the rules and procedures laid down by national law, in so far as those rules and procedures do not have the effect of making the recovery required by European Union law practically impossible and do not undermine the principle of equivalence with procedures for deciding similar but purely national disputes (see Case C-382/99 *Netherlands* v *Commission* [2002] ECR I-5163, paragraph 90). Disputes arising in connection with the enforcement of recovery are a matter for the national court alone (see, to that effect, the order in Case C-297/01 *Sicilcassa and Others* [2003] ECR I-7849, paragraphs 41 and 42).

35 In addition, as pointed out in paragraphs 22, 23 and 29 of this judgment, given that, in its decision, the Commission has not identified the individual recipients of the aid in question or fixed the precise amounts of the aid to be recovered, it is for the national court, if the matter is brought before it, to rule on the amount of aid which the Commission has ordered to be recovered. Where there are difficulties, as has been stated in paragraph 30 of this judgment, it remains open to the national court to contact the Commission for assistance in accordance with the principle of cooperation in good faith laid down in Article 4(3) TEU.

36 It follows that, for the purposes of quantification of the amount of aid to be recovered, the national court must take into account, in circumstances such as those set out in paragraph 31 of the present judgment, all the relevant information of which it has been made aware, including the exchanges between the Commission and the national authorities by application of the principle of cooperation in good faith.

37 It cannot therefore be excluded that, having regard to all those factors, the calculations made by the national court as regards the quantification of the amounts of aid to be repaid result in an amount equal to zero.

38 Moreover, it is apparent from the file sent by the national court that the Commission has expressly accepted, in respect of TIMedia and Fastweb, that there was no aid to be recovered from those two undertakings.

39 Accordingly, and without calling into question the validity of the Commission's decision or the obligation to repay the aid declared unlawful and incompatible with the internal market, the national court may fix an amount of aid equal to zero to the extent that that determination follows directly from the quantification of the sums to be recovered.

40 Having regard to the foregoing, the answer to the second and third questions is that the national court, when determining the exact amounts of aid to be recovered and where the Commission, in its decision declaring an aid scheme unlawful and incompatible with the internal market, has not identified the individual recipients of the aid in question or determined the precise amounts to be repaid, may conclude, without calling into question the validity of the Commission's decision or the obligation to repay the aid in question, that the amount of aid to be repaid is equal to zero where that follows from the calculations made on the basis of all the relevant information of which it has been made aware.

## Costs

41 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. **Although, in order to ensure that a European Commission decision declaring an aid scheme unlawful and incompatible with the internal market and ordering the recovery of the aid in question, but not identifying the individual recipients of that aid and not determining the precise amounts to be recovered is executed, the national court is bound by that decision, it is not, however, bound by the positions adopted by that institution in the execution of that decision. Nevertheless, under the principle of cooperation in good faith laid down in Article 4(3) TEU, the national court must take the statements of position into account as a factor in the assessment of the dispute before it.**

2. **The national court, when determining the exact amounts of aid to be recovered and where the European Commission, in its decision declaring an aid scheme unlawful and incompatible with the internal market, has not identified the individual recipients of the aid in question or determined the precise amounts to be repaid, may conclude, without calling into question the validity of the European Commission's decision or the obligation to repay the aid in question, that the amount of aid to be repaid is equal to zero where that follows from the calculations made on the basis of all the relevant information of which it has been made aware.**

[Signatures]