

Case T-177/07

Mediaset SpA

v

European Commission

(State aid — Telecommunications — Subsidised purchase of digital decoders — Decision declaring the aid incompatible with the common market and ordering its recovery — Concept of State aid — Exclusion of decoders for the reception of television programmes broadcast by satellite — Advantage — Selective nature — Adverse effect on competition — Duty to state reasons)

Judgment of the General Court (Second Chamber), 15 June 2010 II - 2347

Summary of the Judgment

1. *Procedure — Application initiating proceedings — Formal requirements (Rules of Procedure of the General Court, Art. 44(1))*
2. *State aid — Definition — Advantage granted to beneficiaries of State aid (Art. 87(1) EC)*
3. *State aid — Definition — Advantage granted to beneficiaries of State aid — Indirect advantages — Included (Art. 87(1) EC)*

4. *State aid — Prohibition — Exceptions — Aid which can benefit from the derogation provided for in Article 87(3)(c) EC — Conditions*
(Art. 87(3)(c) EC)
5. *Acts of the institutions — Statement of reasons — Obligation — Scope — Commission decision on State aid — Characterisation of adverse effect on competition and trade between Member States*
(Arts 87(1) EC and 253 EC)
6. *State aid — Recovery of unlawful aid — Aid granted in breach of the procedural rules of Article 88 EC — Possible legitimate expectation of the beneficiaries — Legal certainty — Protection — Conditions and limits*
(Art. 88 EC; Council Regulation No 659/1999, Art. 14(1))

1. The application initiating proceedings, which must, under Article 44(1) of the Rules of Procedure of the General Court, set out the subject-matter of the dispute and the pleas in law on which it is based, may be supported and supplemented, with regard to specific points, by references to extracts of documents appended thereto, but the annexes have only a purely evidential and instrumental function. Accordingly, they cannot serve as a basis for developing a plea set out in summary form in the application by putting forward complaints or arguments which are not contained in that application. An applicant must indicate in the application the specific complaints on which the Court is asked to rule and, at the very least in summary form, the legal and factual particulars on which those complaints are based.
(see paras 24-25)
2. A measure consisting of a State subsidy paid to every user of the broadcasting service who purchases or rents equipment for the reception, free-to-air and at no cost to the user or to the content provider, of TV signals transmitted using digital terrestrial technology constitutes an advantage for the purposes

of Article 87(1) EC, which is granted to digital terrestrial broadcasters and cable operators as compared with satellite broadcasters.

The fact that such a measure is very advantageous for consumers, given that it reduces the price of more sophisticated decoders to the price level of basic decoders, has no bearing on the fact that that measure also constitutes an advantage for terrestrial broadcasters and cable operators.

As it is necessary, in order to benefit from such a measure, to satisfy a number of cumulative conditions, including that of purchasing or renting equipment for the reception of digital terrestrial TV signals, it clearly cannot benefit a consumer who decides to purchase or rent equipment exclusively for the reception of digital satellite TV signals. Consequently, such a measure does not meet the requirement of technological neutrality imposed by the Commission for aid measures relating to the digital TV market.

Furthermore, the price of a decoder is a decisive factor which a TV viewer takes into account in making his choice. A subsidy granted directly to consumers automatically has the effect of prompting a reduction in the purchase or rental price of equipment for the reception of digital terrestrial TV signals. Such a price reduction is liable to affect the choice of consumers who are mindful of costs.

Building up an audience is a crucial part of the business for broadcasters of TV programmes. Furthermore, it must be taken into account that such an aid measure creates an incentive for consumers to switch from the analogue to the digital terrestrial mode, while limiting the costs that digital terrestrial TV broadcasters have to bear, enabling those same broadcasters to consolidate their existing position on the market — as compared with the position of new competitors — in terms of brand image and customer retention.

Furthermore, such a measure is selective even though satellite operators may benefit from it by offering 'hybrid' decoders, that is to say, decoders which are both terrestrial and satellite decoders. If that were the case, for satellite broadcasters to make 'hybrid' decoders available would involve extra cost which would be passed on to consumers in the selling price and would at best be offset by the measure at issue from which those consumers benefit. Accordingly, satellite broadcasters

would find themselves in a less favourable position than terrestrial broadcasters and cable operators, who would not have to pass on any additional cost in the selling price of decoders to the consumers benefiting from the measure at issue.

4. In order to be compatible with the common market for the purposes of Article 87(3)(c) EC, aid must pursue an objective in the common interest and must be necessary and proportionate for that purpose.

(see paras 56-57, 60, 62, 64-65, 68, 95)

3. Article 87 EC prohibits aid granted by a State or through State resources in any form whatsoever, without drawing a distinction as to whether the aid-related advantages are granted directly or indirectly. Thus, an advantage granted directly to certain natural or legal persons who are not necessarily undertakings may constitute an indirect advantage, hence State aid, for other natural or legal persons who are undertakings.

It cannot be considered that the common interest objective of a measure consisting of a State subsidy paid to every user of the broadcasting service who purchases or rents equipment for the reception, free-to-air and at no cost to the user or to the content provider, of TV signals transmitted using digital terrestrial technology, is to address a market failure relating, in particular, to the problem of coordination between operators, which is the cause of a barrier to the development of digital broadcasting.

A subsidy granted to consumers can therefore be categorised as State aid to traders providing consumer goods or services.

As incumbent broadcasters have to take the fixing of a statutory deadline for switch-off of the analogue mode as an established fact and, as a consequence, to develop new commercial strategies, subsidies for the purchase of digital decoders are not necessary to correct the problem of coordination between the operators on the market, as that problem has already been dealt with through the setting of a mandatory date for digitisation.

(see paras 75-76)

Furthermore, as the size of the terrestrial TV market in Italy is large, the risk, for commercial operators, of a critical mass of consumers not being reached, owing to a problem of coordination among operators, is not so great that they are unable to cope with it.

granted illegally, the Commission is not required to demonstrate the actual effect which that aid has had on competition and on trade between Member States. If that were the case, such a requirement would ultimately give Member States which grant unlawful aid an advantage over those which notify the aid at the planning stage. In particular, the Commission merely needs to establish that the aid in question is of such a kind as to affect trade between Member States and distorts or threatens to distort competition. It does not have to define the market in question.

(see paras 125-126)

(see paras 144-146)

5. With regard to the categorisation of a measure as aid, the duty to state reasons requires that the reasons which led the Commission to consider that the measure concerned falls within the scope of Article 87(1) EC be stated. As regards the existence of a distortion of competition in the common market, while the Commission must at the very least refer to the circumstances in which aid was granted in the statement of the reasons for its decision where those circumstances show that the aid is such as to affect trade between Member States and to distort or threaten to distort competition, it is not, by contrast, required to carry out an economic analysis of the actual situation on the relevant markets, of the market share of the undertakings in receipt of the aid, of the position of competing undertakings or of trade flows between Member States. Furthermore, in the case of aid
6. Under Article 14(1) of Regulation No 659/1999, relating to the application of Article 88 EC, where negative decisions are taken in cases of unlawful aid, the Commission is to decide that the Member State concerned is to take all necessary measures to recover the aid from the beneficiary. That provision specifies, however, that the Commission is not to require recovery of the aid if this would be contrary to a general principle of Community law. However, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure. A diligent business operator

must normally be in a position to confirm that that procedure has been followed, even if the State granting the aid was responsible for the unlawfulness of the decision to it to such a degree that its revocation appears to be a breach of the principle of good faith.

The principle of legal certainty requires that legal rules be clear and precise and aims to ensure that situations and legal relationships governed by Community law remain foreseeable. In the context of the recovery of aid declared incompatible with the common market, no provision

requires the Commission 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 that amount itself, without overmuch difficulty. It follows that the principle of legal certainty cannot be said to have been infringed because it is difficult to establish the exact value of one of the parameters of the method of calculation set out in the contested decision.

(see paras 170, 173, 179-181)