Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 7 July 2016[1]

Case C-449/14 P

DTS Distribuidora de Televisión Digital SA
v

European Commission

(Appeal — State aid — Aid scheme implemented for RTVE — Modification of the existing aid scheme — Fiscal measures imposed on radio and television operators constituting the new method of financing the aid — Hypothecation of the fiscal measures to the aid — Scope of the criterion based on the direct impact of the revenue from the tax on the amount of the aid — Commission decision declaring the new funding scheme compatible with the common market — Challenge to the lawfulness of the decision — Dismissal by the General Court of the action for annulment)

I – Introduction

1. The present case has its origins in Commission Decision 2011/1/EU,[2] whereby the Commission declared that the Spanish aid scheme in favour of the Corporación de Radio y Televisión Española SA ('RTVE'), the Spanish public radio and television broadcasting organisation funded, in part, by a tax on television and telecommunications operators, was compatible with the internal market.

2. By its appeal, DTS Distribuidora de Televisión Digital SA[3] asks the Court to set aside the judgment of the General Court of the European Union of 11 July 2014 in *DTS Distribuidora de Televisión Digital* v *Commission*,[4] whereby the General Court dismissed its action for annulment of the decision at issue.

3. Telefónica de España SA and Telefónica Móviles España SA[5] have lodged a cross appeal, also seeking to have that judgment set aside.

4. The present case provides the Court with the opportunity to clarify the scope of the criteria to be applied when assessing the extent to which fiscal measures constitute the method of funding State aid, in such a way that they form an integral part of that aid and must therefore be notified to the European Commission. That examination requires proof of the existence of 'hypothecation' between those measures and the aid scheme in question. It is the existence of such hypothecation between the taxes borne by the television and telecommunications operators, such as DTS and Telefónica, and the aid paid to RTVE that is at issue between the parties in the present case.

1 — Original language: French.

2 — Decision of 20 July 2010 on the State aid scheme C-38/09 (ex NN 58/09) which Spain is planning to implement for Corporación de Radio y Televisión Española (RTVE) (OJ 2011 L 1, p. 9, 'the decision at issue').

3 — 'DTS'.

4 — T-533/10, EU:T:2014:629, 'the judgment under appeal'.

5 — Together 'Telefónica'.

5. In fact, the Commission found that there was no hypothecation between the fiscal measures and the aid at issue and concluded, in the decision at issue, that those taxes did not form an integral part of the aid paid to RTVE and, consequently, were not to be taken into consideration in the examination of the compatibility of the aid with the internal market. Thus, on the basis of those considerations, the Commission declared that the aid at issue was compatible with the internal market, in accordance with Article 106(2) TFEU.

6. In the judgment under appeal, the General Court rejected the pleas for annulment raised by DTS and Telefónica against the decision at issue.

7. In the present Opinion, I shall propose that the Court should dismiss the appeal lodged by DTS.

8. First, I shall explain that the General Court did not err in law when assessing the lawfulness of the decision at issue, and in particular when applying the criteria identified by this Court for the purpose of establishing the existence of hypothecation between the fiscal measures borne by DTS and Telefónica and the aid paid to RTVE. I shall then explain that the General Court cannot be accused of not having taken certain provisions of the national legislation into account for the purposes of its analysis or of having distorted the scope of the relevant national law.

9. I shall also propose that the Court should dismiss the cross-appeal lodged by Telefónica, based on a single plea alleging infringement of Article 40 of the Statute of the Court of Justice of the European Union, since the General Court in my view fully examined the admissibility of the pleas for annulment which Telefónica raised at first instance.

II – Background to the dispute and decision at issue

10. By two decisions,[6] the Commission approved the system of funding RTVE established 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.[7] That funding system was a mixed system: 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 remit.

11. That funding system was significantly altered by Ley 8/2009 de financiación de la Corporación de Radio y Televisión Española SA (RTVE) (Law No 8/2009 on the funding of Corporación de Radio y Televisión Española SA (RTVE)) of 28 August 2009,[8] which entered into force on 1 September 2009. In particular, in order to offset the loss of commercial revenue, that law introduced or modified, in Article 2(1)(b) to (d) and Articles 4 to 6, a number of fiscal measures, including a new tax of 1.5% on the revenues of pay-television operators established in Spain.[9] The contribution of that tax to RTVE's budget was limited to 20% of the total annual support for RTVE. Any surplus tax revenue was paid to the general budget of the Spanish State.

12. Furthermore, the compensation for the fulfilment of the public service remit 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 performing its public service obligations, the Spanish State was required, under Article 2(2) of Law No 8/2009 and Article 33 of Law No 17/2006, to make good the shortfall.

6 — 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).

7 — BOE No 134 of 6 June 2006, p. 21270, 'Law No 17/2006'.

8 — BOE No 210 of 31 August 2009, p. 74003, 'Law No 8/2009'.

9 — The other fiscal measures are a new tax of 3% of the revenues of free-to-air television broadcasters, a new tax of 0.9% of the gross operating revenues of telecommunications services operators established in Spain and a share of 80%, up to a maximum amount of EUR 330 million, of the already existing levy on radio spectrum use.

13. Last, 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.

14. 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 with regard to the alteration of RTVE's funding scheme. [10]

15. On 18 March 2010, the Commission initiated proceedings for failure to fulfil obligations under Article 258 TFEU, on the ground that the tax imposed on electronic communications was contrary to Article 12 of Directive 2002/20/EC. [11] On 30 September 2010, in a reasoned opinion, the Commission requested the Kingdom of Spain to abolish that tax on the ground that it was incompatible with that directive.

16. 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 introduced or modified by that law were not an integral part of the new aid elements established 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.

III – The judgment under appeal

17. By application lodged at the Registry of the General Court on 24 November 2010, DTS brought an action for annulment of the decision at issue. In support of that action, 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 introduced or amended by Law No 8/2009; infringement of Article 106(2) TFEU; and infringement of Articles 49 TFEU and 63 TFEU.

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

IV – Forms of order sought and procedure before the Court

19. By its appeal, DTS claims that the Court should:

— set aside the judgment under appeal;

— annul the decision at issue or, in the alternative, refer the case back to the General Court;

— order the Commission and the other parties to pay the costs incurred before this Court and the General Court.

10 — Summarised in OJ 2010 C 8, p. 31.

11 — Directive 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).

20. The Commission contends that the appeal should be dismissed and that DTS should be ordered to pay the costs. Telefónica submitted a response in support of DTS. The Kingdom of Spain and RTVE each submitted a response in support of the Commission.

21. Telefónica 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 this Court and the General Court. RTVE, the Kingdom of Spain and the Commission claim that the Court should dismiss that cross-appeal. DTS did not lodge a response to that cross-appeal.

V – The main appeal

22. By its appeal, DTS takes issue with the General Court solely for having upheld the Commission's conclusion that it was not required to examine the compatibility with the FEU Treaty of the parafiscal tax of 1.5% levied, pursuant to Law No 8/2009, on the gross operating revenues of pay-television operators.

23. DTS thus seeks the abolition of that specific advantage which RTVE derives, emphasising that they are both direct competitors on the market for the acquisition of programme content.

24. In support of its appeal, DTS relies on three pleas in law alleging, respectively, infringement of Article 107(1) TFEU owing to a misinterpretation of the concept of aid; infringement of that provision in that, in the judgment under appeal, the General Court did not undertake a full review of the existence of aid and distorted Spanish law; and an error of law in the application of Article 106(2) TFEU.

A – *Admissibility of the main appeal*

25. RTVE maintains that the appeal is inadmissible since, at 40 pages, it significantly exceeds the maximum length of 25 pages authorised in the Practice Directions to parties concerning cases brought before the Court,[12] and the appellant does not explain why that is so.

26. Furthermore, RTVE and the Kingdom of Spain maintain that the appeal does not precisely identify the paragraphs of the judgment under appeal which are disputed. In their submission, the appeal thus merely reiterates the arguments put forward at first instance or raises points of fact.

27. DTS disputes those arguments.

28. To my mind, none of the pleas of inadmissibility raised by RTVE and the Kingdom of Spain can be upheld.

29. First, as is clear from the case-law of the Court, the Practice Directions are indicative and have no binding force. 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.[13] Thus, although, in point 20 of those directions, it is expressly stated that the appeal 'should not exceed 25 pages', those Directions, as the

12 — OJ 2014 L 31, p. 1

13 — Recitals 1 to 3 of those Directions.

Court has observed in its case-law, do not absolutely prescribe a maximum number of pages.[14] In the absence of provisions expressly laid down in the Statute of the Court of Justice of the European Union and the Rules of Procedure, the fact that the appeal lodged by the appellant exceeds the maximum number of pages fixed in the Practice Directions cannot therefore render the appeal inadmissible.

30. Second, examination of the appeal shows that the applicant states precisely the errors of law vitiating the judgment under appeal and explains in detail the reasons why that judgment should be set aside. In those circumstances, the requirements laid down by the Court are in my view satisfied.[15]

31. In addition, contrary to RTVE's and the Kingdom of Spain's contentions, the appeal lodged by DTS does not merely reiterate the arguments put forward at first instance or raise questions of fact. DTS disputes the way in which the General Court interpreted and applied EU law, and in particular the criteria laid down by this Court, in order to establish that the fiscal measures are an integral part of an aid scheme. In that regard, it should be pointed out that, in order to ensure the effectiveness of the appeal procedure, the points of law examined at first instance can clearly be discussed again in the course to the appeal brought before the Court and an appellant can thus base his appeal on pleas in law and arguments already relied on before the General Court.[16]

32. In the light of those factors, I therefore propose that the Court should declare the appeal lodged by DTS admissible.

B – *First plea, alleging infringement of Article 107(1) TFEU owing to an incorrect interpretation of the concept of aid*

33. By its first plea, DTS takes issue with the General Court's analysis set out in paragraphs 92 to 104 of the judgment under appeal, following which the General Court concluded that the Commission was entitled to find that the three fiscal measures introduced or modified by Law No 8/2009 did not form an integral part of the aid received by RTVE. The appellant maintains, in essence, that the tax which it is required to pay constitutes aid within the meaning of Article 107(1) TFEU since, like the tax on direct sales of medicinal products referred to in the case giving rise to the judgment of 7 September 2006 in *Laboratoires Boiron* (C-526/04, EU:C:2006:528), it is an asymmetric tax introduced for the purpose of directly funding RTVE.

34. Contrary to the Kingdom of Spain's contention, the admissibility of this plea is to my mind not in doubt, since the applicant challenges the findings made by the General Court on the basis of the facts and the applicable national rules concerning the existence, in the light of the criteria established in the case-law of the Court of Justice, of hypothecation between the fiscal measures at issue and the aid paid to RTVE.

35. This plea consists of two parts, alleging, misinterpretation of, respectively, the appellant's arguments and the case-law of the Court of Justice.

14 — See, to that effect, order of 30 April 2010 in *Ziegler* v *Commission* (C-113/09 P(R), not published, EU:C:2010:242, paragraph 33).

15 — It will be recalled that it is settled case-law that 'an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside, and also the legal arguments specifically advanced in support of the appeal' (see, in particular, judgment of 4 July 2000 in *Bergaderm and Goupil* v *Commission*, C-352/98 P, EU:C:2000:361, paragraph 34).

16 — Judgment of 18 January 2007 in *PKK and KNK* v *Council* (C-229/05 P, EU:C:2007:32, paragraph 32 and the case-law cited).

1. First part of the first plea, alleging misinterpretation of the appellant's arguments

36. By the first part of its first plea, the appellant maintains that the General Court was wrong to take the view, in paragraphs 92 and 93 of the judgment under appeal, that it intended, by its arguments, to call into question the principle established by this Court in its judgments of 20 September 2001 in *Banks* (C-390/98, EU:C:2001:456) and of 27 October 2005 in *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). In the appellant's submission, the General Court also erred in law by referring to those judgments, in so far as the tax at issue is distinct from a tax of general application and the aid granted to RTVE does not consist in exemption from that tax.

(a) The judgment under appeal

37. After setting out DTS's arguments, the General Court, in paragraph 92 of the judgment under appeal, began to examine those arguments, recalling the distinction which the FEU Treaty draws between the rules governing State aid and the rules relating to national tax provisions. The Court of Justice thus stated that, according to settled case-law, 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, referring in that instance to the judgment of 20 September 2001 in *Banks* (C-390/98, EU:C:2001:456).

38. In paragraph 93 of the judgment under appeal, the General Court then explained that the appellant sought to call that principle into question, since, according to the appellant's approach, 'an undertaking could challenge the levying of any tax solely on the ground that it serves to finance an advantage enjoyed by another undertaking with which it is in a competitive relationship'.

(b) My analysis

39. Like RTVE and the Commission, I am of the view that the first part of the first plea is ineffective, since it is directed against considerations which are not part of the *ratio decidendi* of the judgment under appeal.

40. The conclusion which the General Court draws in paragraphs 103 and 104 of the judgment under appeal, namely that the Commission was entitled to consider that the three fiscal measures introduced or modified by Law No 8/2009 were not an integral part of the aid measure, is based on an analysis of whether those measures were hypothecated to the aid paid to RTVE and whether the judgment of 7 September 2006 in *Laboratoires Boiron* (C-526/04, EU:C:2006:528) could be applied by analogy in the instant case, as DTS had requested in its written pleadings.

41. In paragraph 92 of the judgment under appeal, when embarking on its examination of the second part of the first plea, the General Court merely referred to the principle underlying the case-law of the Court of Justice on the treatment of parafiscal taxes in the light of the law on State aid. That principle, according to which persons liable to pay a tax cannot rely on the argument that the exemption enjoyed by other undertakings constitutes State aid in order to avoid payment of that tax or to obtain a refund, is expressly referred to by the Court of Justice in its judgment of 7 September 2006 in *Laboratoires Boiron* (C-526/04, EU:C:2006:528), on which the appellant expressly relies, and in its judgments of 27 October 2005 in *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), and of 15 June 2006 in *Air Liquide Industries Belgium* (C-393/04 and C-41/05, EU:C:2006:403).[17] That principle was also recalled by the appellant in paragraph 42 of its application before the General Court.

17 — See paragraphs 42 and 43, respectively.

42. Then, in paragraph 93 of the judgment under appeal, the General Court merely set out the appellant's arguments, without drawing a legal conclusion from them.

43. I would note, in that regard, that the appellant does not claim, as such, any distortion on the part of the General Court. Be that as it may, although the appellant maintains that it never intended to defend such an approach, it is clear from the arguments which it puts forward in support of the second part of its first plea that it aims to extend the scope of the criterion based on the existence of hypothecation between a tax and the aid funded by that tax to cover the situation in which there is a competitive relationship between those required to pay a tax and the beneficiary of the aid funded by that tax. In doing so, the appellant does indeed intend, by its approach, to reverse the consistent case-law of the Court of Justice to which the General Court refers in paragraph 92 of the judgment under appeal and to secure the abolition of the tax of 1.5% imposed on it pursuant to Article 6 of Law No 8/2009.

44. In the light of those factors, and in particular of those set out in points 40 to 42 of this Opinion, I consider, consequently, that the first part of the first plea is ineffective.

2. Second part of the first plea, alleging misinterpretation of the Court's case-law

45. By the second part of its first plea, DTS, supported by Telefónica, challenges the General Court's analysis, in paragraphs 99 to 103 of the judgment under appeal, where it concluded that the taxes in issue are not comparable to the fiscal measure imposed in the case giving rise to the judgment of 7 September 2006 in *Laboratoires Boiron* (C-526/04, EU:C:2006:528).

(a) The judgment under appeal

46. In paragraphs 94 to 103 of the judgment under appeal, the General Court sets out the reasons why the present case must be distinguished from the case giving rise to the judgment of 7 September 2006 in *Laboratoires Boiron* (C-526/04, EU:C:2006:528), on which DTS relies, so that the solution adopted by the Court in that judgment cannot be applied by analogy to the present case. First of all, in paragraph 95 of the judgment under appeal, the General Court considers that the criterion based on a competitive relationship between the persons required to pay a tax and the beneficiaries of aid funded by that tax is not sufficient to ensure the existence of hypothecation between the tax and the aid within the meaning of the case-law of the Court of Justice. Next, in paragraphs 96 to 102 of the judgment under appeal, the General Court sets out the specific aspects that distinguish the tax referred to in the case giving rise to the judgment of 7 September 2006 in *Laboratoires Boiron* (C-526/04, EU:C:2006:528) from the tax at issue in the present case.

(b) Arguments of the parties

47. First, DTS maintains that the tax imposed on it should be considered to form an integral part of the aid granted to RTVE in that it constitutes an asymmetric tax, comparable to the tax referred to in the case giving rise to the judgment of 7 September 2006 in *Laboratoires Boiron* (C-526/04, EU:C:2006:528). That tax is imposed on a single category of operators — pay-television operators — which are in competition with RTVE, both on the market for viewers and on the market for the acquisition of programme content. The aid is the consequence of the fact that a competitor is subject to a tax and the fact that the revenue generated by the tax is necessarily allocated to the funding of the aid.

48. Second, DTS maintains that the specific aspects to which the General Court refers in paragraph 98 et seq. of the judgment under appeal, which distinguish the tax referred to in the case giving rise to the judgment of 7 September 2006 in *Laboratoires Boiron* (C-526/04, EU:C:2006:528) from the tax at issue in the present case, are irrelevant. First, the objective of the tax is not a decisive factor, since the concept of aid is an objective concept. In any event, the purpose of the tax imposed on DTS is very similar and manifestly comparable to the purpose of the tax examined in the case giving rise to the judgment of 7 September 2006 in *Laboratoires Boiron* (C-526/04, EU:C:2006:528). Second, the link between the fiscal measure and the aid at issue is as close as that referred to in that judgment. In that regard, DTS maintains that the General Court was wrong to find that any incompatibility of the tax with EU law would not directly undermine the aid at issue.

49. Third, DTS maintains that the tax at issue clearly affects the amount of the aid granted to RTVE, since, as it is imposed on a competitor, it secures a competitive advantage for the beneficiary of the aid.

50. Intervening in support of DTS, Telefónica further submits that the Commission made other errors of law in interpreting the concept of 'aid' within the meaning of Article 107(1) TFEU.

51. In the first place, Telefónica submits that the General Court erred in law in interpreting restrictively the conditions that must be satisfied in order for the method of funding aid to form an integral part of the aid, when the rules should be given a teleological interpretation. [18]

52. In the second place, Telefónica submits that the conditions laid down in the case-law for the purpose of establishing hypothecation between a fiscal measure and aid, namely, the existence of a binding provision of national law hypothecating the tax to the funding of the aid and proof that the revenue from the tax has a direct impact on the amount of the aid, are not distinct and cumulative conditions. The hypothecation of the tax to the funding of the aid implies in itself a necessary link between the amount of the tax revenue and the amount of the aid. [19] The General Court thus misinterpreted the judgment of 13 January 2005 in *Streekgewest* (C-174/02, EU:C:2005:10), in which the Court examined only whether the tax was 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 would be a logical consequence.

53. In the third place, Telefónica maintains that the General Court's interpretation of the judgments of 21 October 2003 in *van Calster and Others* (C-261/01 and C-262/01, EU:C:2003:571) and of 27 November 2003 in *Enirisorse* (C-34/01 to C-38/01, EU:C:2003:640) is incorrect. The fact that the Court of Justice does not rule on the requirement that the fiscal measure must have a direct impact on the amount of the aid does not mean that it considered that an additional condition must be satisfied in order to determine whether the method of funding aid is part of the aid, but that may be explained by the fact that those judgments were delivered in the first cases in which the Court shed light on the question of inseparability.

54. RTVE, the Kingdom of Spain and the Commission dispute those arguments.

(c) My analysis

55. The second part of the first plea, to my mind, raises three questions relating to the way in which, according to the Court's case-law, the existence of hypothecation between a fiscal measure and an aid scheme must be assessed.

18 — Telefónica refers to the judgments of 25 June 1970 in *France* v *Commission* (47/69, EU:C:1970:60) and of 15 June 1993 in *Matra* v *Commission* (C-225/91, EU:C:1993:239).

19 — Telefónica refers to the judgments of 13 January 2005 in *Pape* (C-175/02, EU:C:2005:11); of 14 April 2005 in *AEM and AEM Torino* (C-128/03 and C-129/03, EU:C:2005:224); and of 27 October 2005 in *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).

56. The first question, raised by Telefónica, is whether the conditions laid down in the case-law for the purpose of establishing hypothecation between a fiscal measure and aid are cumulative.

57. The second question, raised by DTS, concerns whether, contrary to the findings of the General Court in the judgment under appeal, the link between the fiscal measures introduced by Law No 8/2009 and the aid paid to RTVE is in fact as close as the link between the fiscal measure and the aid scheme at issue in the case giving rise to the judgment of 7 September 2006 in *Laboratoires Boiron* (C-526/04, EU:C:2006:528), in such a way that the solution adopted by the Court of Justice in that judgment could be applied by analogy in the present case.

58. Last, the third question, raised by DTS concerns, more particularly, the scope of the criterion based on a 'direct impact of the revenue from the tax on the amount of the aid', which was laid down for the purpose of establishing the existence of hypothecation between the tax and the aid in question. DTS seeks, in fact, to extend the scope of that criterion, to cover the situation in which the tax borne by a competitor confers a competitive advantage on the beneficiary of the aid.

i) The criteria for establishing hypothecation between a fiscal measure and an aid scheme

59. The analysis in respect of the existence of hypothecation between a tax and an aid will make it possible to establish whether that tax constitutes a method of funding the aid and, accordingly, forms an integral part of the aid. That analysis must also allow the Commission to undertake a full and appropriate consideration of a State aid.[20] The way in which an aid is financed may render the aid incompatible with the internal market.[21] The Commission cannot therefore consider an aid separately from the effects of its method of financing where that method forms an integral part of the aid in question.[22] The analysis must also make it possible to ensure the effectiveness of the obligation to notify the aid. In order to comply with that obligation, the Member State is thus required to notify not only the planned aid in the narrow sense, but also the method of financing the aid in so far as that method is an integral part of the planned measure.[23]

60. The Court defined the scope of the principle based on the existence of hypothecation between a fiscal measure and an aid in its judgment of 13 January 2005 in *Streekgewest* (C-174/02, EU:C:2005:10), as follows:

'For a tax … to be regarded as forming an integral part of an aid measure, it must be hypothecated to the aid measure under the relevant national rules, in the sense that the revenue from the tax is necessarily allocated for the financing of the aid. In the event of such hypothecation, the revenue from the tax has a direct impact on the amount of the aid and, consequently, on the assessment of the compatibility of the aid with the common market'.[24]

61. One of the questions raised by the second part of the first plea is whether, in order to establish that the tax is hypothecated to the tax financed by it, it is necessary to show not only that there is a binding provision of national law requiring the tax to be hypothecated to the funding of the aid, but also that the revenue from the tax has an impact on the amount of the aid.

20 — See judgment of 21 October 2003 in *van Calster and Others* (C-261/01 and C-262/01, EU:C:2003:571, paragraph 51).

21 — See judgment of 21 October 2003 in *van Calster and Others* (C-261/01 and C-262/01, EU:C:2003:571, paragraph 47). See also, to that effect, judgment of 25 June 1970 in *France* v *Commission* (47/69, EU:C:1970:60, paragraph 14).

22 — See judgments of 21 October 2003 in *van Calster and Others* (C-261/01 and C-262/01, EU:C:2003:571, paragraph 49), and of 27 November 2003 in *Enirisorse* (C-34/01 to C-38/01, EU:C:2003:640, paragraph 44).

23 — See judgment of 21 October 2003 in *van Calster and Others* (C-261/01 and C-262/01, EU:C:2003:571, paragraph 51).

24 — Paragraph 26.

62. Telefónica maintains that, according to the Court's case-law, the relevant conditions are not separate and distinct conditions, since the direct impact of the fiscal measure on the amount of the aid is a logical consequence of the hypothecation provided for in the relevant national rules. In its submission, the General Court thus misinterpreted the case-law of the Court of Justice.

63. It must be admitted that the way in which the principle is formulated in the judgment of 13 January 2005 in *Streekgewest* (C-174/02, EU:C:2005:10) — which is also found in the judgments of 27 October 2005 in *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) and of 7 September 2006 in *Laboratoires Boiron* (C-526/04, EU:C:2006:528) — lends to confusion, as the Court states that '[if the tax is hypothecated to the aid under the relevant national rules], the revenue from the tax has a direct impact on the amount of the aid'. [25]

64. In fact, the two conditions referred to, namely the existence of a binding provision of national law under which the tax must be hypothecated to the funding of the aid, and proof that the revenue from the tax has a direct impact on the amount of the aid, are to my mind, and as the General Court found, cumulative.

65. First of all, it is useful to recall the earliest bases for the principle established by the Court in its judgment of 13 January 2005 in *Streekgewest* (C-174/02, EU:C:2005:10), by referring to paragraph 17 of the judgment of 25 June 1970 in *France* v *Commission* (47/69, EU:C:1970:60). In that paragraph, the Court pointed out that 'in its appraisal, the Commission must … take into account all those factors which directly or indirectly characterise the measure in question, that is, not only aid, properly so-called, for selected national activities, but also the indirect aid which may be constituted both by the method of financing and by *the close connection which makes the amount of aid dependent upon the revenue from the charge*'. [26]

66. In so far as tax revenue cannot be allocated to specific expenditure in the absence of national legislation, the first condition, based on the existence of a binding provision of national law under which the tax must be hypothecated to the financing of the aid, is an essential precondition. Yet that condition is not in itself sufficient to establish the extent to which the proceeds of that revenue have an actual impact on the amount of the aid, since, in addition to the provisions of national law requiring that hypothecation, the Member State may have a certain discretion in allocating its revenues or put in place an adjustment mechanism that would sever the hypothecation provided for in the national legislation. In order to assess the existence and, if necessary, the force of the hypothecation between the tax and the aid, it is therefore necessary to determine the extent to which the aid in question is actually financed by and dependent on the revenue from the tax.

67. To my mind, that is the clear meaning of the last point to which the Court refers in paragraph 17 of its judgment of 25 June 1970 in *France* v *Commission* (47/69, EU:C:1970:60). In that judgment, the Court found, moreover, that hypothecation exists when the method of financing in question is such that the amount of the aid is automatically increased in proportion to the revenue from the tax. [27]

68. Next, it is useful to note that the Court has reformulated that principle in its most recent case-law, thus providing a clear indication that the tax is hypothecated to the aid under the relevant national rules when 'the revenue from the charge is necessarily allocated for the financing of the aid *and* has a direct impact on the amount of the aid'. [28]

25 — See judgment of 13 January 2005 in *Streekgewest* (C-174/02, EU:C:2005:10, paragraph 26).

26 — Emphasis added.

27 — Paragraph 20.

28 — Judgments of 15 June 2006 in *Air Liquide Industries Belgium* (C-393/04 and C-41/05, EU:C:2006:403, paragraph 46), and of 22 December 2008 in *Régie Networks* (C-333/07, EU:C:2008:764, paragraph 99) (emphasis added).

69. In its judgment of 22 December 2008 in *Régie Networks* (C-333/07, EU:C:2008:764), the Court therefore examined each of those conditions. In the case giving rise to that judgment, it was apparent from the relevant national rules that the charge on advertising companies was levied specifically and solely for the purpose of financing the radio broadcasting aid in question.[29] In addition, the net revenue from the charge on advertising companies was used wholly and exclusively to finance radio broadcasting aid and therefore had a direct impact on the amount of that aid.[30] In those circumstances, the Court held that the revenue generated by the charge had an impact on the amount of the aid paid, since the grant of that aid and its extent were dependent on the revenue from that charge, with the consequence that the charge must be regarded as forming an integral part of the radio broadcasting aid scheme.[31]

70. Last, to disregard that second condition, as the appellant proposes, would render the principle established by the Court wholly ineffective. The Court speaks not of a binding 'legal' link but of 'hypothecation' between the tax and the aid measure. The concept of 'hypothecation' is taken from the language of accounting and finance and relates to the allocation of a revenue, which is collected through the imposition of a specific tax, to specific expenditure. It therefore falls to be determined, on a case-by-case basis, whether, on the basis of the national legislation and the way in which it is applied in practice, the fiscal revenues in question are actually and specially intended to finance the aid, contrary to the principle of the universality of fiscal revenues.

71. In the light of those factors, I think that, having regard to the case-law of the Court, the condition based on the existence of a binding provision of national law under which the tax must be hypothecated to the financing of the aid is not in itself sufficient to establish that a tax forms an integral part of an aid measure. Where such a provision of national law exists, as is the case here,[32] it is also necessary to determine whether the revenue from the tax has a direct impact on the amount of the aid.

72. To my mind, therefore, the General Court did not err in law when it considered, in the light of the case-law to which I have just referred, that the two abovementioned conditions are cumulative, and the arguments to that effect raised by Telefónica must therefore be rejected as unfounded.

ii) The application by analogy of the solution adopted by the Court in its judgment of 7 September 2006 in Laboratoires Boiron (C-526/04, EU:C:2006:528)

73. As I see it, the Court's reasoning in its judgment of 7 September 2006 in *Laboratoires Boiron* (C-526/04, EU:C:2006:528)[33] cannot be applied by analogy to the present case, and the General Court therefore did not in my view err in law by distinguishing the three fiscal measures at issue from the fiscal measure referred to in that judgment.

29 — Judgment of 22 December 2008 in *Régie Networks* (C-333/07, EU:C:2008:764, paragraph 100).

30 — Judgment of 22 December 2008 in *Régie Networks* (C-333/07, EU:C:2008:764, paragraph 104).

31 — Judgment of 22 December 2008 in *Régie Networks* (C-333/07, EU:C:2008:764, paragraphs 111 and 112).

32 — In this case that condition is satisfied — and that finding has not been called into question by the parties — since it is clear from Article 5(1) and Article 6(1) of Law No 8/2009 that the taxes imposed on telecommunications operators are levied 'in order to contribute to the funding of RTVE' and from the wording of Article 6(8) of Law No 8/2009 that 'the proceeds of the contribution shall be assigned to the funding of RTVE'. The Commission also established, in paragraph 13 of the grounds of the decision at issue, that 'the preamble expressly establishes this link between the new taxes and the financial compensation for withdrawing RTVE from the advertising market'.

33 — The case giving rise to that judgment concerned whether the fact that wholesale distributors were not subject to a tax on direct sales of medicinal products imposed on pharmaceutical laboratories overcompensated the former and, as such, amounted to unlawful aid in their favour. In that case, the tax imposed on the pharmaceutical laboratories was intended to provide compensation for the additional costs borne by the wholesale distributors in discharging their public service obligations.

74. While the distinction drawn by the General Court in paragraph 100 of the judgment under appeal concerning the objective of the aid is not in my view a decisive factor, the circumstances referred to in paragraphs 101 and 102 of that judgment, on the other hand, allow a clear distinction to be drawn between the present case and the case giving rise to the judgment of 7 September 2006 in *Laboratoires Boiron* (C-526/04, EU:C:2006:528).

75. First, as the General Court correctly observed in paragraph 101 of the judgment under appeal, the connection between the fiscal measures and the aid at issue can clearly not be as close as the link between the tax on direct sales of medicinal products borne by Laboratoires Boiron SA and the exemption granted to the wholesale distributors.

76. In fact, in the case giving rise to the judgment of 7 September 2006 in *Laboratoires Boiron* (C-526/04, EU:C:2006:528) there was an intrinsic link between the tax and the aid (exemption from that tax), 'two elements of one and the same fiscal measure which [were] inseparable', according to the Court,[34] which, as the General Court observed in the judgment under appeal, made it impossible to distinguish one from the other, which is clearly not the position here. The inapplicability of the fiscal measure resulting from its incompatibility with EU law thus quite logically and directly entailed the abolition of the aid.

77. In addition, it must be pointed out that the amount of the aid paid to RTVE in order to finance its public service obligations does not depend on the amount of the fiscal revenue at issue received from the pay-television operators.

78. First, it is clear from Article 2(2) of Law No 8/2009 and from Article 33 of Law No 17/2006 — the terms of which were not in my view distorted by the General Court, as I shall demonstrate when I examine the second plea — that the amount of the aid granted to RTVE in order to finance its public service obligations is calculated on the basis of the net costs of the public service obligations borne by RTVE in the preceding financial years.[35]

79. Second, while there is, admittedly, a binding legislative link between the revenue generated by the tax at issue and the aid paid to RTVE, the national rules establish an adjustment mechanism referred to by the General Court in paragraph 101 of the judgment under appeal which in my view has the effect that the two conditions laid down in the case-law cannot be deemed to be satisfied.

80. In fact, the Spanish State operates the adjustment variable upwards as well as downwards, by undertaking, where the revenue is insufficient, to cover all of RTVE's costs and, where there is a surplus, by attributing that surplus to its general budget, also leaving itself a discretion as regards the proportion of the tax revenue which it actually intends to pay to RTVE.[36] The link between the tax and the aid is therefore not the 'direct and inseparable' link to which Advocate General Geelhoed referred in his Opinion in *Streekgewest* (C-174/02, EU:C:2004:124).

81. Thus, Article 2(2) of Law No 8/2009 and Article 33 of Law No 17/2006, to which the General Court makes express reference in paragraph 101 of the judgment under appeal, establish a principle under which the costs of the public service obligations borne by RTVE are fully covered and a 'top up' obligation is imposed on the Spanish State. Thus, as the General Court observes in paragraphs 9, 80 and 101 of the judgment under appeal, if the sources of funding available to RTVE, which include

34 — Judgment of 7 September 2006 in *Laboratoires Boiron* (C-526/04, EU:C:2006:528, paragraph 45).

35 — See paragraph 32 of the grounds of the decision at issue.

36 — See paragraphs 15 and 33 of the grounds of the decision at issue.

the fiscal measure in question, are not sufficient to cover all of the costs incurred by RTVE in performing its public service obligations, the Spanish State is required to make up the shortfall. The financing of the net costs of meeting the public service obligations performed by RTVE is thus guaranteed independently of the revenue generated by the fiscal measures at issue. [37]

82. Where there is a surplus, that surplus is, conversely, transferred to the general State budget and used for other purposes. [38]

83. The fact that the fiscal revenues are higher or lower than expected therefore does not have an impact on the planned amounts for the public service compensation to be paid to RTVE. [39]

84. Although the system established by the national rules therefore provides for the incorporation of the revenue from the tax in the aid paid to RTVE, in my view the adjustment mechanism referred to in Article 2(2) of Law No 8/2009 and Article 33 of Law No 17/2006, and the discretion left to the Spanish State, distort that link. The link between the tax and aid scheme is clearly not severed, but, in any event, it is no longer sufficiently close, first, to satisfy the 'direct impact' criterion referred to in the case-law and, second, to allow the solution adopted by the Court in its judgment of 7 September 2006 in *Laboratoires Boiron* (C-526/04, EU:C:2006:528) to be applied by analogy in the present case.

85. Finally, although a binding link exists as a result of the budget line, that link is not reflected in the amount of the aid paid to RTVE.

86. The appellant's argument that the General Court erred in finding that any incompatibility of the tax with EU law would not directly undermine the aid at issue must therefore be rejected.

iii) The criterion based on the competitive advantage enjoyed by the beneficiary of the aid

87. DTS maintains that, contrary to the finding of the General Court, the tax has 'a direct impact on the amount of the aid' in so far as it is borne by an undertaking in competition with the beneficiary of the aid, and thus secures a competitive advantage for that beneficiary. In other words, the aid is more significant because it is financed by a tax levied on competitors.

88. To my mind, the General Court did not err in law in paragraph 102 of the judgment under appeal when it considered that the existence of a competitive relationship between the persons required to pay the tax and the beneficiary of the aid financed by that tax is not sufficient to support the conclusion that the tax forms an integral part of that aid.

89. First, we have seen that, according to the Court's case-law, two conditions must be satisfied in order to establish that a tax is an integral part of an aid measure:

— there must be a binding condition of national law under which the tax is hypothecated to the funding of the aid, and

— the revenue from the tax must have a direct impact on the amount of the aid.

90. If one of those conditions is not satisfied, a tax cannot be regarded as forming an integral part of an aid measure and the criterion based on a competitive advantage is not sufficient to offset that conclusion.

37 — See paragraphs 14 and 34 of the grounds of the decision at issue.

38 — See paragraphs 15 and 33 of the grounds of the decision at issue.

39 — See paragraph 34 of the grounds of the decision at issue.

91. Admittedly, as Advocate General Geelhoed observed in his Opinion in *Streekgewest* (C-174/02, EU:C:2004:124), whether there is a direct and inseparable link between the levy and the aid financed from it should be assessed in each case from the wording of the rules concerned, the system underlying them, the manner in which they are applied 'and the economic context in which they are applied' [40] In that connection, Advocate General Geelhoed observed, in particular that the extent to which the combination of the levy and aid measure influences competition in the (sub)sector or business sphere concerned is indicative of the existence of such a link. [41]

92. However, in its judgment of 22 December 2008 in *Régie Networks* (C-333/07, EU:C:2008:764) the Court held that it is not a decisive factor.

93. First, as the Court pointed out in that judgment, the relevant context is not that of the substantive assessment of the compatibility of the aid with the internal market carried out by the Commission under Article 107 TFEU, in which examination of the competitive relationships is clearly of paramount importance, [42] but that of the assessment of the existence of 'hypothecation' between a tax and the aid scheme financed by the tax, for the purpose of determining the scope of the obligation to notify the aid laid down in Article 108(3) TFEU.

94. Second, the question is whether the revenue generated by the tax has a direct impact on 'the amount of the aid', which should be interpreted in the purest accounting sense as referring to the amount or the volume of the aid. In the German and French versions of the case-law, 'the amount of the aid' is rendered, respectively, by the expressions 'den Umfang der Beihilfe' et 'l'importance de l'aide'. [43] The answer to that question is arrived at on the basis of a purely accounting assessment and therefore precludes an analysis of the competitive relationship between those required to pay the tax and the beneficiaries of the aid.

95. Third, if the question of the competitive relationship between the persons liable to pay a tax and the beneficiary of aid funded by that tax were established as an additional criterion, it would, according to the Court, be apt to affect the effectiveness of the control carried out by the Commission. That control would then rely on each Member State carrying out a prior unilateral assessment of the existence and the status of the competitive relationships. [44] To my mind, that risk is even greater because in practice such a tax is levied at a sectoral level, with the consequence that those liable to pay the tax and the beneficiary of the aid operate on the same or related markets.

96. If the appellant's argument were to be followed, it would mean that whenever a tax is levied at sectoral level and is imposed on undertakings in competition with the beneficiary of the aid, the criterion based on hypothecation would be satisfied. Such an interpretation would be manifestly contrary to the Court's consistent case-law. The Court has intended to interpret the existence of hypothecation very restrictively, in such a way as to respect the precise delimitation which the FEU Treaty places between the rules on State aid and the rules on the distortions resulting from the fiscal provisions adopted by the Member States.

97. In the light of those factors, I therefore consider that the General Court was correct to reject the appellant's argument based on the alleged competitive advantage enjoyed by RTVE as a result of the tax imposed on its competitors, for the purposes of its assessment relating to the existence of hypothecation between the fiscal measures at issue and the aid paid to RTVE.

40 — Point 34 of that Opinion.

41 — Point 35 of that Opinion.

42 — It will be recalled that the purpose of that provision is to preserve competition between undertakings by prohibiting any aid granted by a Member State and meeting the conditions set out in Article 106(1) TFEU.

43 — See, in particular, judgment of 13 January 2005 in *Streekgewest* (C-174/02, EU:C:2005:10, paragraph 26).

44 — See judgment of 22 December 2008 in *Régie Networks* (C-333/07, EU:C:2008:764, paragraph 95).

98. The complaint raised by DTS in that regard must therefore be rejected as unfounded.

iv) The fact that excess revenue available to RTVE is paid into a reserve fund and, if necessary, transferred to the Public Treasury [45]

99. DTS takes issue with the General Court for having considered that the revenue from the tax does not have an impact on the amount of the aid, since, as is apparent from paragraphs 66 and 67 of the judgment under appeal, the income which exceeds the net costs of the public service is paid into a reserve fund or transferred to the Public Treasury and since an absolute limit is laid down for RTVE's income. DTS maintains that the existence of such an absolute limit is irrelevant. In accordance with the judgment of 22 December 2008 in *Régie Networks* (C-333/07, EU:C:2008:764), in such a case, in order to be able to conclude that the tax has an impact on the amount of the aid, it is relevant that the fixing of the aid is also dependent, within the limits of the ceiling, on the projected income from the tax, which is the case here.

100. I consider that this complaint is unfounded.

101. As I have stated, the fact that, in accordance with Article 33 of Law No 17/2006 and Article 8 of Law No 8/2009, the excess income available to RTVE is to be paid into a reserve fund and, where appropriate, transferred to the Public Treasury severs the hypothecation between the tax revenue and the aid in question. In that situation, the revenue from the tax does not automatically have an impact on the amount of the aid, since the excess will be re-allocated for other purposes and the amount of the aid will not be allowed to increase.

102. To my mind, the parallel which the appellant draws with the judgment of 22 December 2008 in *Régie Networks* (C-333/07, EU:C:2008:764) is irrelevant. In the case giving rise to that judgment, as is expressly stated in paragraph 104 of that judgment, the revenue from the charge on advertising companies was used 'wholly' and exclusively to finance radio broadcasting aid. In addition, although that aid was actually allocated by a committee, that committee did not have the power to allocate the available funds for purposes other than that of such aid. That is clearly not the case here, since the tax revenue in question is not intended wholly and exclusively to fund the aid, as the excess is paid into a reserve fund and, where appropriate, to the Public Treasury in order to be reallocated for other purposes.

103. The General Court therefore did not in my view err in law when it considered that the mechanism referred to in Article 33 of Law No 17/2006 and Article 8 of Law No 8/2009 did not allow the tax to be regarded as having a direct impact on the aid intended for RTVE.

104. In the light of those considerations, the second part of the first plea must be rejected as unfounded.

105. I therefore propose that the Court should declare the first plea raised by the appellant, alleging infringement of Article 107(1) TFEU owing to misinterpretation of the concept of aid, ineffective in part and unfounded in part.

45 — This argument initially appeared in the second plea submitted by DTS. Since that plea relates to an error of law by the General Court in the interpretation of the case-law of the Court of Justice, I have chosen to deal with it in the context of the first plea.

C – *Second plea, alleging insufficiency of the judicial review carried out by the General Court and distortion of the applicable national legislation in its assessment of an infringement of Article 107(1) TFEU*

106. By its second plea, DTS criticises the analysis of the national legislation carried out by the General Court in paragraphs 66, 67 and 69 of the judgment under appeal in order to arrive at the conclusion, set out in paragraphs 102 to 104 of the judgment under appeal, that the tax imposed on DTS did not have an impact on the amount of the aid granted to RTVE and therefore does not form an integral part of the aid scheme.

107. This second plea consists of two parts.

108. The first part alleges insufficiency of the judicial review carried out by the General Court in the context of its assessment of whether the tax is hypothecated to the aid at issue.

109. The second part alleges distortion of the applicable national legislation, so that the General Court did not take into account, for the purposes of its analysis, the fact that RTVE's projected budget is established by reference to the projected amount of the tax revenue, with the consequence that that amount has a direct impact on the amount of the aid.

1. The judgment under appeal

110. In paragraph 65 of the judgment under appeal, the General Court concluded, in the light of the terms of Law No 8/2009, that the amount of the aid to be given to RTVE does not depend on the amount of revenue generated by the fiscal measures imposed on the applicant, as the amount of the aid is fixed by reference to the net costs of performing RTVE's public service mandate.

111. In order to substantiate that conclusion, in paragraphs 66 to 68 of the judgment under appeal the General Court examined the terms of Article 33 of Law No 17/2006 and Article 3(2) and Article 8 of Law No 8/2009, which define the role of the Spanish State where the income available to RTVE exceeds the costs of performing the public service mandate.

112. In paragraph 69 of the judgment under appeal, moreover, the General Court examined the terms of Article 2(2) of Law No 8/2009, which defines the role of the Spanish State where the income available to RTVE is not sufficient to cover the costs of performing its public service mandate.

2. First part of the second plea, alleging insufficiency of the judicial review carried out by the General Court

(a) Arguments of the parties

113. By the first part of its second plea, the appellant maintains that the judicial review which the General Court carried out with regard to the decision at issue was insufficient. It submits that the General Court did not take into account the relevant provisions of the Spanish legislative framework, and in particular Article 34 of Law No 17/2006 and Article 44 of the mandato-marco a la Corporación RTVE previsto en el articulo 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).[46] In the appellant's submission, it is clear from those provisions

46 — BOE No 157 of 30 June 2008, p. 28833, 'the framework mandate'.

that RTVE is required by law to draw up its own budget, taking into account not only the projected costs of its public service mandate but also its projected revenue, which includes the revenue from the tax at issue. That shows that the projected amount of the revenue from the tax imposed on DTS has an impact on the amount of the aid received by RTVE.

114. The appellant maintains, moreover, that the General Court did not carry out a full review of the Commission's assessments as regards the conditions laid down in the judgment of 22 December 2008 in *Régie Networks* (C-333/07, EU:C:2008:764), where it was held that the revenue from the tax has an impact on the amount of the aid where the subsidy granted is calculated by reference to the 'expected' revenue or the 'projected amount' of the revenues from the tax. The appellant submits that the General Court did not consider the extent to which the projected amount of the revenue has an impact on the calculation of the aid, but merely approved the Commission's analysis.

115. RTVE, the Kingdom of Spain and the Commission dispute the admissibility of such an argument. RTVE and the Kingdom of Spain claim that the General Court is not required to mention each of the provisions of the national legal framework that are applicable. Nor were Article 34 of Law No 17/2006 and Article 44 of the framework mandate considered relevant by DTS before the General Court. As for the Commission, it submits that DTS did not rely on Article 33 and Article 34 of Law No 17/2006, Article 44 of the framework mandate and Article 2(2) and Article 8 of Law No 8/2009 either in its application or in its reply before the General Court, and that it is not for the General Court to raise rules of national law of its own motion when examining the lawfulness of a Commission decision.

116. In any event, RTVE, the Kingdom of Spain and the Commission maintain that those complaints are unfounded.

(b) My analysis

i) First argument, alleging failure to take Article 34 of Law No 17/2006 and Article 44 of the framework mandate into consideration

117. It should be pointed out at the outset that, in spite of the significance which DTS appears to attach to the abovementioned provisions in this appeal, it did not mention them in any of the pleadings which it lodged before the General Court. The fact that DTS did not deem it appropriate, in its application initiating the action or in its reply, to mention those provisions shows in my view that they are not essential or relevant provisions.

118. As the appellant observes in footnote 3 to its appeal, the text of Law No 17/2006 and that of the framework mandate were annexed, respectively, to the Commission's defence and to RTVE's statement in intervention before the General Court. In fact, it was primarily for the appellant, in the context of its action for annulment of the decision at issue, to identify exhaustively the provisions of the applicable national law which it deems relevant and the General Court cannot be criticised for not having adjudicated on some of those provisions even though the appellant did not expressly refer to them. Although the appellant states that it made reference to those provisions at the hearing before the General Court, the extent to which DTS referred to Article 34 of Law No 17/2006 and Article 44 of the framework mandate is not known.

119. In any event, I would observe that the General Court alone has jurisdiction to assess the value that should be placed on the evidence adduced before it.[47] It was therefore perfectly entitled to omit Article 34 of Law No 17/2006 and Article 44 of the framework mandate from its analysis. As we shall see below, those provisions, in the light of their object, did not reveal the nature of the hypothecation between the tax at issue and the aid paid to RTVE.

120. In those circumstances, I consider that the first argument is inadmissible.

ii) Second argument, alleging insufficiency of the judicial review carried out by the Court as regards the conditions laid down in the judgment of 22 December 2008 in Régie Networks (C-333/07, EU:C:2008:764)

121. I propose at the outset that the second argument should be rejected on the ground that it is unfounded.

122. In fact, for the reasons stated in point 102 of this Opinion, the parallel which the applicant draws between the present case and the case giving rise to the judgment of 22 December 2008 in *Régie Networks* (C-333/07, EU:C:2008:764) is irrelevant. In the latter case, not only was there a legal provision under which the revenue from the charge was allocated to the radio broadcasting aid, but the revenue from that charge was wholly and exclusively allocated to financing that aid, with no re-allocation of the surplus for other purposes.

123. In the light of those factors, the first part of the second plea must therefore be rejected as inadmissible in part and unfounded in part.

3. Second part of the second plea, alleging distortion of the applicable national legislation

(a) Arguments of the parties

124. By the second part of its second plea, the appellant, supported by Telefónica, claims that the General Court, in paragraphs 66, 67 and 69 of the judgment under appeal, distorted Article 2(2) and Article 8 of Law No 8/2009 and Article 33 of Law No 17/2006, on which it relied when concluding that the tax at issue does not have an impact on the amount of the aid intended for RTVE. The appellant maintains that the General Court ascribed to those provisions a significance which they do not have when analysed in conjunction with Article 34 of Law No 17/2006 and Article 44 of the framework mandate.

125. Telefónica also maintains that the General Court misinterpreted the national legislation and thus manifestly distorted the evidence which Telefónica adduced before it.

126. RTVE, the Kingdom of Spain and the Commission contend that this plea is inadmissible.

(b) My analysis

127. Contrary to the contention of RTVE, the Kingdom of Spain and the Commission, the second part of the second plea is in my view admissible.

47 — It has consistently been held that the General Court has exclusive jurisdiction to find and assess the facts and that it also has exclusive jurisdiction to assess the value which should be attached to the evidence produced to it, provided that the evidence which it has applied in support of those facts has been properly obtained and the general principles of law and rules of procedure in relation to the burden of proof and the taking of evidence have been observed (see judgments of 21 September 2006 in *JCB Service* v *Commission*, C-167/04 P, EU:C:2006:594, paragraphs 106 and 107, and the case-law cited, and of 10 May 2007 in *SGL Carbon* v *Commission*, C-328/05 P, EU:C:2007:277, paragraph 41 and the case-law cited).

128. In fact, the Court may entertain complaints relating to the establishment and the assessment of the facts where the appellant claims that the General Court distorted the evidence adduced before it. [48] That is indeed the position in this case, since DTS claims that the General Court distorted the national legislation and indicates precisely the evidence which in its submission was distorted by the General Court and the errors of analysis which in its view led the General Court to distort that evidence.

129. The Court may therefore carry out a judicial review.

130. It has consistently been held that the Court must determine whether the General Court, on the basis of the documents and other evidence submitted to it, distorted the wording of the national provisions at issue, whether it made findings that were manifestly inconsistent with their content and whether, in examining all the particulars, it attributed to one of them, for the purpose of establishing the content of the national law at issue, a significance which is not appropriate in the light of the other particulars. [49]

131. Nonetheless, such distortion must be obvious from the documents in the file, without there being any need for the Court to carry out a new assessment of the facts and the evidence or to take new evidence into account. [50]

132. After carefully reading the arguments put forward by DTS, I have reached the conclusion that it has not succeeded in showing that the General Court, in paragraphs 66 to 69 of the judgment under appeal, made findings of fact that were manifestly inconsistent with the content of the provisions of the Spanish legislation at issue or that it attributed to one of them a significance which was manifestly not appropriate in the light of the other evidence in the file.

i) The interpretation in paragraph 69 of the judgment under appeal of the terms of Article 2(2) of Law No 8/2009

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

134. In DTS's submission, that provision does not require the Spanish State to provide resources from its general budget in order to cover costs linked with the public service mandate, but requires it to supplement the budget planned for RTVE when, in execution of that budget, the amount of the tax revenue is lower than the budget forecasts. Furthermore, the contributions from the general budget are authorised only where expenditure exceeds the budget forecasts.

135. In addition, DTS maintains that Article 2(2) of Law No 8/2009 must be analysed in conjunction with Article 34 of Law No 17/2006 and Article 44 of the framework mandate. According to Article 34 of Law No 17/2006, RTVE itself is to set its budget, taking into account not only the projected costs of the public service remit but also the projected revenue, including the revenue from the taxes provided for in Law No 8/2009. Consequently, under Article 2(2) of Law No 8/2009, in the event that the actual revenue from the taxes 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 Spanish 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 the tax and, consequently, that

48 — Judgment of 3 April 2014 in *France* v *Commission* (C-559/12 P, EU:C:2014:217, paragraph 79 and the case-law cited).

49 — Judgment of 5 July 2011 in *Edwin* v *OHIM* (C-263/09 P, EU:C:2011:452, paragraph 53).

50 — See, in particular, judgments of 21 September 2006 in *JCB Service* v *Commission* (C-167/04 P, EU:C:2006:594, paragraph 108 and the case-law cited); of 18 January 2007 in *PKK and KNK* v *Council* (C-229/05 P, EU:C:2007:32, paragraph 37 and the case-law cited); and of 3 April 2014 in *France* v *Commission* (C-559/12 P, EU:C:2014:217, paragraph 80 and the case-law cited).

amount has a direct impact on the amount of the aid. The impact of the revenue from the tax on the implementation of RTVE's budget is therefore not to be confused with the impact of the projected amount of the revenue from the tax on the initial setting of that budget and, accordingly, on the amount of the aid. Only the amount of the aid is relevant.

136. Telefónica further submits that there are clear indications that contradict the possibility of an alleged additional contribution from the general budget of the Spanish State, as 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, it is a secondary hypothesis, since two conditions must be satisfied in order for the Spanish State to finance a proportion of the costs of the public service obligation. First, for a given year, the revenue from the tax must be lower than the costs of carrying out the public service mandate and, second, the amount of the reserve fund must be insufficient to cover RTVE's costs for that year. In addition, Article 2(2) of Law No 8/2009 establishes a State guarantee limited to the shortfall between the taxes plus the reserve fund and the costs of the public service obligation. There is thus a new aid measure. That does not preclude the aid granted to RTVE being fixed on the basis of the revenue from the tax or preclude the Spanish State undertaking to make good the shortfall where the revenue from the tax is not sufficient.

137. To my mind, nothing in the appellant's arguments is capable of showing that the General Court manifestly distorted the wording of Article 2(2) of Law No 8/2009.

138. First, in maintaining that, in accordance with that provision, 'the Spanish State is required to supplement the "budget forecasts" by means of contributions from its general budget' or that '[that] provision requires the State to supplement the RTVE's "budget forecasts" where, in implementing it, the amount of the tax revenue is below the budget forecasts', the appellant does not depart from the General Court's interpretation of Article 2(2) of Law No 8/2009.

139. Second, although the appellant takes issue with the General Court for not having interpreted that provision in the light of the wording of Article 34 of Law No 17/2006 and Article 44 of the framework mandate, I am wholly unable to see how those provisions would be relevant.

140. Article 34 of Law No 17/2006, entitled 'Budgets', provides as follows:

'1. RTVE … shall draw up an operating budget which shall specify the resources and the corresponding annual appropriations and an equally detailed capital budget. RTVE's operating and capital budgets … shall form part of the general budget of the State.

2. RTVE's operating and capital budgets … shall include an account of results and a table of projected funding for the year in question. A projected balance sheet of the entity and the additional documents required by the Ministry … shall be annexed to these budgets.

…'

141. Article 44 of the framework mandate, entitled 'Budgetary obligations', states, in addition, the following:

'RTVE and its companies shall adjust their budget to the provisions of Article 34 of Law No 17/2006. Those budgets shall be drawn up in accordance with the principle of budgetary equilibrium and they shall forecast the financial obligations necessary to pursue the general objectives set out in this framework mandate as developed in the programme-contract in force.'

142. It must be stated — as, moreover, RTVE and the Commission submit – that those provisions establish only general principles and that none of their terms is capable of establishing that the tax revenues in question are hypothecated to the aid scheme in favour of RTVE.

143. Nor, third, are Telefónica's arguments capable of demonstrating that the General Court made findings that were manifestly contrary to the terms of Article 2(2) of Law No 8/2009. As regards the grounds of that law, they have no binding force and the extract identified by Telefónica clearly does not preclude a supplementary contribution from the Spanish State. In addition, it is irrelevant in my view that it is a question of a secondary hypothesis. The General Court refers to the existence of such a hypothesis in terms which are sufficient to lead to the conclusion set out in paragraph 101 of the judgment under appeal, namely that the Spanish State will be required to make up the shortfall between the sources of funding available to RTVE and all of the costs incurred by RTVE in performing its public service obligations.

ii) The interpretation, in paragraphs 66 to 68 of the judgment under appeal, of the terms of Article 33 of Law No 17/2006 and Article 8 of Law No 8/2009

– *The judgment under appeal*

144. In paragraphs 66 to 68 of the judgment under appeal, the General Court held as follows:

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

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

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

– *Arguments of the parties*[51]

145. First, DTS takes issue with the General Court for having, in paragraphs 66 and 67 of the judgment under appeal, distorted the provisions of Article 33 of Law No 17/2006 and Article 8 of Law No 8/2009 by ascribing to them a significance which they do not have. It maintains that the General Court merely asserted that, in accordance with Article 8(3) of Law No 8/2009, the reserve fund can be used only with the express authorisation of the Ministerio de Economía y Hacienda (Spanish Ministry of the Economy and Finance), omitting the opening words of that provision, namely 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'. In the appellant's submission, the amount of those additional resources necessarily depends on the revenue from the taxes, since that fund is financed by those taxes.

51 — In the first place, DTS took issue with the General Court for having taken the view that the revenue from the tax has no impact on the amount of the aid, since the revenue that exceeds the net costs of the public service is paid into a reserve fund or transferred to the Public Treasury and since an absolute limit was laid down for RTVE's revenue; RTVE refers to the judgment of 22 December 2008 in *Régie Networks* (C-333/07, EU:C:2008:764). As the first argument alleged that the General Court erred in law when interpreting the case-law of the Court of Justice, I chose to deal with it in the context of the first plea.

146. Telefónica contends, 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 abolish any relationship between the amount of the aid and the amount of the levies imposed on the basis of the fiscal measures. The fact that the revenue may be paid to the general budget of the Spanish State is a secondary possibility. 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. At most, Article 33(1) of Law No 17/2006 places a limit on the amount of the aid. That does not preclude the total revenue from the tax being converted into aid within the limit set by the national legislature. That limit is an essential precondition of the compatibility of the aid, failing which there would be over-compensation contrary to EU law.

– *My analysis*

147. Those arguments must be rejected.

148. As regards the appellant's arguments, I note, first of all, that in paragraph 66 of the judgment under appeal, the General Court sets out in essentially identical terms the interpretation of the provisions of Article 33 of Law No 17/2006 that the appellant itself set out in paragraph 10 of its application initiating the proceedings. [52]

149. Next, as regards the General Court's analysis in paragraph 67 of the judgment under appeal, DTS merely states the terms of a provision, Article 8(3) of Law No 8/2009, which does not in any way contradict the General Court's interpretation of the Spanish legislation or permit the conclusion that the amount of the tax borne by the appellant has an impact of the amount of the aid granted to RTVE.

150. As regards Telefónica's arguments, none of them is capable of proving that the General Court manifestly distorted the terms of the provisions in question. Whether the hypothesis to which the General Court refers is secondary or not does not affect the fact that, in accordance with Article 33 of Law No 17/2006, the excess, in so far as it does not exceed 10% of RTVE's budgeted annual costs, is to be paid into a reserve fund and, in so far as it does exceed that limit, is to be transferred to the Public Treasury, which is not in any way contradicted by Telefónica. Furthermore, contrary to the appellant's and Telefónica's contentions, the General Court concluded not that the amount of the aid is independent of the amount of the tax revenue, but that the amount of the tax revenue is not capable of having a 'direct impact' on the amount of the aid paid to RTVE.

151. In the light of those factors, I therefore propose that the Court should reject the second plea, alleging insufficiency of the judicial review carried out by the General Court and distortion of the applicable national legislation in the context of its assessment as to whether there had been an infringement of Article 107(1) TFEU, as inadmissible in part and unfounded in part.

D – *Third plea, alleging distortion and breach of the limits on judicial review by the General Court in its assessment of an infringement of Article 106(2) TFEU*

152. In the present case, the appellant maintains in a sufficiently detailed manner that the General Court distorted the arguments which the appellant put forward in support of its second plea for annulment, alleging infringement of Article 106(2) TFEU, as a result of which the General Court adjudicated *ultra petita*, altered the subject-matter of the dispute and exceeded the limits of its judicial review.

52 — Paragraph 10 is worded as follows:
'The Law also establishes a reserve fund to which revenue in excess of the net cost of the public service is to be allocated, up to a maximum of 10% of the budgeted annual expenditure, while revenue in excess of that maximum amount is to be paid to the Public Treasury …'

153. In those circumstances, the third plea, contrary to RTVE's contention, is admissible.

154. This third plea consists of two parts, the first alleging distortion and the second breach by the General Court of the limits of its judicial review, it being understood that whether or not the second part must be examined will depend on whether the first part is declared well founded.

1. First part of the third plea, alleging distortion of the arguments put forward at first instance in support of the claim of infringement of Article 106(2) TFEU

155. I would point out that, according to settled case-law, distortion must be obvious from the documents on the file, without there being any need for the Court of Justice to carry out a new assessment of the facts and the evidence.

156. In fact, the assessment undertaken by the General Court in paragraphs 118 to 167 of the judgment under appeal is not in my view vitiated by such distortion.

157. First, DTS maintains that the General Court, in paragraphs 151 and 152 of the judgment under appeal, misinterpreted the second plea for annulment by drawing a distinction between 'the [appellant's] arguments concerning the effects of the aid elements provided for by RTVE's funding scheme, as amended by Law No 8/2009'. It is clear from the procedural documents that DTS never put forward any arguments relating to the effects of the aid properly so-called.

158. Indeed, in paragraph 59 of the application initiating the proceedings, DTS introduced the second plea for annulment by stating that 'the Commission infringed Article 106(2) TFEU by authorising aid that did not satisfy the requirement of proportionality laid down in that article, *in that the taxes which serve to finance the aid* entail a distortion of competition contrary to the general interest.[53]

159. In view of the reasons and arguments stated by the appellant in its application initiating the proceedings and in its reply, the General Court was entitled to take the view that the appellant was calling in question the Commission's assessment of the effects on competition not only of the three fiscal measures introduced or modified by Law No 8/2009, but also of the aid elements provided for in RTVE's funding scheme as amended by that law.

160. In paragraph 77 of its application, DTS introduced its arguments relating to distortion of competition by stating that competition on the market for viewers and the markets for the acquisition of programme content is distorted in a manner contrary to the common interest, by '*the system for the funding of RTVE*, authorised by the … decision [at issue] (and in particular the "contribution" of 1.5% imposed on pay-television operators)' and, in the reply, DTS also refers generally to the 'new funding scheme [or regime]'.[54]

161. In addition, in paragraphs 93 to 99 of its application, DTS expressly calls into question 'the mechanisms provided for by Law No 8/2009' to avoid the distortion of competition caused by RTVE's activity, and in particular the provisions laid down in Article 3(1) to Article 6(5) and Article 9(1)(i) and (m) of Law No 8/2009.

162. However, as is apparent from paragraphs 94 to 99 of the application lodged by DTS and also from paragraphs 162 to 164 of the judgment under appeal, those mechanisms are separate from the fiscal measures challenged by the appellant and come within the system for the funding of the aid paid to RTVE.

53 — Emphasis added.

54 — See paragraphs 27 and 28 of the reply submitted by DTW.

163. In those circumstances, having regard to the arguments put forward by the appellant in its written pleadings, it cannot be maintained that the General Court misinterpreted the second plea for annulment by drawing a distinction between the 'arguments which the appellant makes in relation to the effects of the three fiscal measures introduced or modified by Law No 8/2009' and the '[appellant's] arguments concerning the effects of the aid elements provided for under RTVE's funding scheme, as amended by Law No 8/2009'.

164. This first argument must therefore be rejected.

165. Second, DTS maintains that the General Court distorted its arguments in paragraph 120 of the judgment under appeal by wrongly distinguishing the argument relating the fact that RTVE increased its bid on the market for the acquisition of programme content from the argument that competition is distorted to a degree that is contrary to the common interest. In its submission, it clear from the procedural documents that DTS claimed that the new method of funding RTVE, and in particular the tax imposed on DTS, enabled RTVE to distort competition to a degree that was contrary to the common interest by disproportionately strengthening its competitive position, thus enabling it to engage in anti-competitive conduct such as increasing its bid.

166. Those criticisms are unfounded.

167. In fact, it must be held that the distinction drawn by the General Court has its origins in the distinction which the appellant itself drew in paragraphs 80 and 81 of the application initiating the proceedings.

168. In paragraph 80 of its application, DTS maintained, in effect, 'in the first place, [that the new funding scheme allows] RTVE to acquire premium broadcasting rights which are not necessary for the purpose of performing its public service remit'. The appellant therefore expressly invited the General Court to consider whether the Commission had made a manifest error of assessment when reviewing the proportionality of the compensation paid to RTVE in connection with its public service remit. That review makes it possible to assess the extent to which competition or trade might be affected in a manner that would be contrary to the interests of the European Union within the meaning of Article 106(2) TFEU. In accordance with the case-law to which the General Court refers in paragraph 117 of the judgment under appeal, that review must make it possible to ascertain whether the compensation provided for is necessary so that the public service in question can be performed in economically acceptable circumstances or, conversely, whether the measure in question is manifestly inappropriate by reference to the objective pursued.

169. In paragraphs 149 to 166 of the judgment under appeal, the General Court therefore examined the complaint alleging an effect on trade to a degree that would be contrary to the interests of the European Union. It must be observed that, in the context of that examination, the General Court took into account, in paragraph 159 of the judgment under appeal, the harmful effects to which the appellant refers.

170. In paragraph 81 of its application, DTS maintained, 'in the second place', that the new resources granted to RTVE enable it to bid higher in order to acquire premium broadcasting rights. In paragraphs 81 to 87 of its application, the appellant then set out a number of cases in which RTVE had acquired rights and which could demonstrate that RTVE acted in an anti-competitive manner.

171. In paragraphs 129 to 147 of the judgment under appeal, the General Court therefore considered whether the Commission had in fact made a manifest error of assessment concerning the risk of anti-competitive conduct on the part of RTVE on the market for the acquisition of rights to broadcast sporting events and films, concentrating, in particular, on RTVE's practice of outbidding its competitors.

172. In the light of those factors, the General Court cannot therefore be accused of having distinguished the two arguments, in paragraph 120 of the judgment under appeal and in the following part of its reasoning, not only because such a distinction was drawn by the appellant, but also because those arguments had to be examined separately in order to determine whether they were well founded.

173. This second argument must therefore also be rejected.

174. Third, DTS maintains that, in paragraphs 130 and 157 of the judgment under appeal, the General Court misinterpreted its arguments, since DTS never asserted that RTVE's funding scheme distorts competition merely because that scheme allows it to compete with private operators on the markets for the acquisition of programme content. Conversely, DTS alleged that the tax imposed on it aggravates the distortion of competition arising from the aid itself, since the financial resources available to it on the markets in question are reduced and RTVE's ability to engage in anti-competitive conduct on those markets is strengthened.

175. In paragraph 130 of the judgment under appeal, the General Court presented the appellant's argument as being based on the fact that 'the public resources available to RTVE under its funding scheme enable it to compete with private operators in the market for the acquisition of programme content'. Admittedly, the appellant did not assert in its application or in its reply that RTVE's funding scheme distorts competition merely because that scheme enables it to compete with private operators on the markets for the acquisition of programme content.

176. Nonetheless, in paragraphs 67 to 76 of its application, the appellant explained at length the state of competition on the market for viewers and also on the markets for the acquisition of programme content, emphasising the advantageous competitive position enjoyed by RTVE owing to the new funding scheme and illustrating its claims by referring to the numerous acquisitions made by RTVE to the detriment of its competitors.

177. In the last sentence of paragraph 130 of the judgment under appeal, the General Court thus concluded that 'the mere fact that RTVE competes with private operators in the market for the acquisition of programme content, and *in some cases prevails over private operators*, is not in itself sufficient to demonstrate a manifest error of assessment on the Commission's part'.[55] To my mind, that conclusion is connected with the applicant's submissions. Although the terms in which the General Court presented DTS's argument are admittedly incomplete, they do not, on the other hand, demonstrate a manifest error of assessment.

178. Consequently, this third argument must be rejected.

179. Fourth, and last, DTS maintains that the General Court distorted its arguments in paragraphs 141 and 158 of the judgment under appeal, since DTS never asserted that 'the effects of [RTVE's past conduct] will continue into the future' or that RTVE's funding scheme 'led to [DTS's] own programming offer being impoverished and is having an adverse effect on its subscriptions'. On the contrary, DTS provided examples to illustrate the type of anti-competitive conduct in which RTVE was able to engage owing to the considerable resources which it traditionally enjoyed and which under the new funding scheme were able to continue and increase.

55 — Emphasis added.

180. As regards, first, the General Court's observation that the effects of the examples of the acquisition of rights by RTVE would, according to DTS, 'continue into the future' (paragraph 141 of the judgment under appeal), it should be pointed out that, in paragraph 87 of its application, DTS stated that '[the outbidding practice] will continue and increase' owing to the new funding scheme authorised by the decision at issue, adding, in paragraph 28 of its reply, that 'the new funding scheme guarantees RTVE resources *that will enable it to accentuate its policy of outbidding*'.[56] The meaning which the General Court ascribed to those assertions does not in my view contradict their content.

181. As regards, second, the General Court's observation that RTVE's funding scheme 'led to [DTS's] own programming offer being impoverished and is having an adverse effect on its subscriptions' (paragraph 158 of the judgment under appeal), it must be stated that the General Court employed verbatim the words used by the applicant in paragraph 28 of its reply, which stated that 'the funding scheme [at issue] weakens [DTS's] competitive position … by depriving it of significant resources and obliging it to reduce its investments in content, *which will necessarily impoverish its pay-television offer and cause it to lose subscribers*'.[57]

182. This fourth argument must therefore be rejected.

183. In the light of those factors, the first part of the third plea, alleging distortion, is unfounded.

184. In so far as the second part of the third plea, alleging breach by the General Court of the limits of its judicial review, was dependent on the first part being well founded, there is thus no need to examine the second part.

185. In the light of those factors, I therefore propose that the Court should reject the third plea, alleging distortion and breach of the limits of the General Court's judicial review in the context of its assessment of an infringement of Article 106(2) TFEU, as unfounded.

E – *Fourth plea raised by Telefónica, alleging infringement of Article 40 of the Statute of the Court of Justice of the European Union*

186. In its response, Telefónica raised a separate plea from those raised by DTS, alleging infringement of Article 40 of the Statute of the Court of Justice of the European Union. Telefónica maintains that the General Court erred in law in rejecting as inadmissible its argument relating to an infringement of Article 108 TFEU.

187. It should be pointed out that Telefónica has raised this plea in identical terms, and on the basis of the same reasoning, in the cross-appeal which it has lodged before the Court.

188. In accordance with Article 174 of the Rules of Procedure, 'a response shall seek to have the appeal allowed or dismissed, in whole or in part'.

189. Since the fourth plea seeks to have the judgment under appeal set aside on a ground not raised by the appellant in its appeal, this plea, which is separate from and independent of those raised by DTS, is in my view inadmissible.

190. On the other hand, I shall examine the merits of this plea in so far as it is raised in the cross-appeal lodged by Telefónica.

56 — Emphasis added.

57 — Emphasis added.

191. I therefore propose that the Court should reject the fourth plea raised by Telefónica, alleging infringement by the General Court of the State of the Court of Justice of the European Union, as inadmissible.

192. In the light of all of those considerations, the appeal lodged by DTS must be dismissed as inadmissible in part and unfounded in part.

193. There is thus no need to adjudicate on the request submitted by the Kingdom of Spain on the basis of the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union.

VI – The cross-appeal

194. Telefónica has submitted a cross-appeal against the judgment under appeal, in accordance with Article 176 of the Rules of Procedure, in which it raises a separate plea from those raised by DTS in the main appeal.

195. In support of its cross-appeal, Telefónica relies 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 its argument relating to an infringement of Article 108 TFEU.

196. This plea is directed against the General Court's analysis in paragraphs 207 to 219 of the judgment under appeal.

A – *The judgment under appeal*

197. In paragraph 214 of the judgment under appeal, the General Court rejected the two pleas put forward by Telefónica alleging infringement of Article 108 TFEU as inadmissible in so far as they were unconnected with the subject-matter of the dispute as defined by the main parties and therefore altered the framework of the dispute to a degree contrary to Article 40 of the Statute of the Court of Justice of the European Union.

198. In paragraph 211 of the judgment under appeal, the General Court based its analysis on the words of that article, which states in the fourth paragraph that 'an application to intervene shall be limited to supporting the form of order sought by one of the parties', and on the wording of Article 129(3) of the Rules of Procedure and the relevant case-law.

199. After setting out, in paragraph 212 of the judgment under appeal, the framework of the dispute as defined by DTS, the General Court found, in the following paragraph, that neither the application nor the defence submitted by DTS contained arguments concerning a possible infringement of Article 108 TFEU; that allegation of infringement was therefore raised for the first time in the Telefónica's statement in intervention.

200. In paragraphs 216 and 217 of the judgment under appeal, the General Court then answered the arguments specifically raised by Telefónica concerning the admissibility of the two additional pleas.

201. Following that analysis, the General Court found that those pleas were inadmissible.

B – *Arguments of the parties*

202. Telefónica maintains that the General Court was not entitled to reject as inadmissible its plea alleging infringement of Article 108 TFEU on the ground that, as it was raised for the first time in the statement in intervention, it was unconnected with the subject-matter of the dispute.

203. First of all, in paragraph 216 of the judgment under appeal, the General Court could not rely on the judgment of 19 November 1998 in *United Kingdom* v *Council* (C-150/94, EU:C:1998:547), since Telefónica had not referred to that judgment.

204. Next, in paragraph 217 of the judgment under appeal, the General Court does not explain how the judgment of 8 July 2010 in *Commission* v *Italy* (C-334/08, EU:C:2010:414), delivered in an action for failure to fulfil obligations, shows that the intervener has greater freedom to raise pleas not put forward by the main party. In its judgment of 28 July 2011 in *Diputación Foral de Vizcaya and Others* v *Commission* (C-474/09 P to C-476/09 P, EU:C:2011:522), concerning State aid proceedings, the Court of Justice also adopted the same solution as in the judgment of 8 July 2010 in *Commission* v *Italy* (C-334/08, EU:C:2010:414).[58] 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, in particular, to set out its pleas in law, would be rendered meaningless.

205. RTVE maintains that the cross-appeal is inadmissible and that it is in any event unfounded. The Kingdom of Spain and the Commission also dispute Telefónica's arguments.

C – *My analysis*

206. In my view, the cross-appeal is admissible.

207. Although the single plea raised by Telefónica was not actually to be found in the response lodged in the context of the main appeal, it appears to me, on the other hand, that Telefónica was entitled, in accordance with Article 178(1) and (3) of the Rules of Procedure, to raise that plea in a cross-appeal.

208. Admittedly, Article 178(3) of the Rules of Procedure states that the pleas in law and legal arguments relied on in support of the cross-appeal 'must be separate from those relied on in the response'. However, since that plea, relied on in the response, is inadmissible, it seems to me that Article 178(3) of the Rules of Procedure does not prevent the Court from examining it in the context of the cross-appeal.

209. As regards, at present, the merits of the plea, the General Court was to my mind correct to find that the pleas raised at first instance and alleging infringement of Article 108 TFEU were inadmissible.

210. First, it is clear from the words of the statement in intervention lodged by Telefónica before the General Court that Telefónica sought annulment of the decision at issue on the ground that the Commission had infringed Article 108 TFEU even though DTS had not alleged infringement of that provision in its written pleadings.

211. As the General Court correctly observed in paragraph 212 of the judgment under appeal, the three pleas for annulment put forward by DTS alleged infringement of Article 107 TFEU, Article 49 TFEU, Article 64 TFEU and Article 106(2) TFEU respectively.

212. The plea put forward by Telefónica in its statement in intervention was therefore wholly unconnected with the subject-matter of the dispute as it had been defined by DTS and thus altered the framework of the dispute to a degree contrary to Article 40 of the Statute of the Court of Justice of the European Union.

213. Second, the complaint whereby Telefónica takes issue with the General Court for having referred to paragraph 36 of the judgment of 19 November 1998 in *United Kingdom* v *Council* (C-150/94, EU:C:1998:547) is to my mind wholly ineffective.

58 — Paragraph 108 et seq.

214. Although Telefónica maintains that it made no reference to that case-law in its statement in intervention, I note that it does put forward a detailed allegation of distortion. In those circumstances, and in so far as the General Court had no interest in examining of its own motion a judgment capable of undermining its own findings, I assume that that reference to the case-law was made by Telefónica during the proceedings at first instance, as the General Court maintains.

215. Even if the General Court was wrong to take the view that that argument was put forward by Telefónica, such a complaint would in my view be ineffective. Contrary to Telefónica's assertion, examination of paragraph 36 of the judgment of 19 November 1998 in *United Kingdom* v *Council* (C-150/94, EU:C:1998:547) allowed the General Court not to justify a finding that Telefónica's pleas were inadmissible but, on the contrary, to consider whether the solution adopted by the Court of Justice in that judgment was capable of undermining its own findings as to the admissibility of those pleas. The General Court cannot therefore be criticised for having carried out such an examination.

216. Third, the complaint whereby Telefónica takes issue with the General Court for having made errors of assessment concerning the significance of the judgment of 8 July 2010 in *Commission* v *Italy* (C-334/08, EU:C:2010:414) is unfounded.

217. Contrary to Telefónica's contention, the General Court sets out clearly and exhaustively, in paragraph 217 of the judgment under appeal, the reasons why, as regards the object of the intervention, a distinction must be drawn between the procedure in an action for failure to fulfil obligations and the procedure in an action for annulment. As RTVE and the Kingdom of Spain observe, actions for annulment and actions for failure to fulfil obligations have different purposes and objects.

218. Furthermore, 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.

219. Article 132(2) of the Rules of Procedure comes within the context of the limits established by the intervention procedure and that provision must be read in the light of the preceding provisions. Under Article 129 of the Rules of Procedure, entitled 'Object and effects of the intervention', it is made clear that 'the intervention shall be limited to supporting, in whole or in part, the form of order sought by one of the parties', that '[it] shall be ancillary to the main proceedings' and that 'the intervener must accept the case as he finds it at the time of his intervention'.

220. In the light of those factors, the General Court in my view fully examined the admissibility of Telefónica's pleas for annulment and I therefore propose that the Court should reject as unfounded the single plea alleging infringement of Article 40 of the Statute of the Court of Justice of the European Union.

221. In the light of all of those considerations, the cross-appeal lodged by Telefónica must therefore be rejected.

VII – Conclusion

222. In the light of the foregoing considerations, I propose that the Court should:

1. Dismiss the appeals;

2. Order Distribuidora de Televisión Digital SA and also Telefónica de España SA and Telefónica Móviles España SA to pay the costs.