JUDGMENT OF THE GENERAL COURT (First Chamber, Extended Composition)

16 December 2010 *

In Joined Cases T-231/06 and T-237/06,

Kingdom of the Netherlands, represented by H. Sevenster and M. de Grave, acting as Agents,

applicant in Case T-231/06,

Nederlandse Omroep Stichting (NOS), established in Hilversum (Netherlands), represented by J. Feenstra and H. Speyart van Woerden, lawyers,

applicant in Case T-237/06,

* Language of the case: Dutch.

European Commission, represented by N. Khan and H. van Vliet, acting as Agents,

defendant,

APPLICATIONS for annulment of Commission Decision 2008/136/EC of 22 June 2006 on the ad hoc financing of Netherlands public service broadcasters C 2/2004 (ex NN 170/2003) (OJ 2008 L 49, p. 1),

THE GENERAL COURT (First Chamber, Extended Composition),

composed, at the time of the deliberation, of F. Dehousse (Rapporteur), acting as President, I. Wiszniewska-Białecka, K. Jürimäe, A. Dittrich and S. Soldevila Fragoso, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 10 March 2010,

gives the following

Judgment

Legal context

1 Article 16 EC provides:

'Without prejudice to Articles 73 [EC], 86 [EC] and 87 [EC], and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions.'

2 Article 86(2) EC states:

'Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.'

3 Article 87(1) EC reads:

'Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.'

4 Article 311 EC states:

'The protocols annexed to this Treaty by common accord of the Member States shall form an integral part thereof.'

5 Under the Protocol on the system of public broadcasting in the Member States (OJ 1997 C 340, p. 109, 'the Amsterdam Protocol'), which was introduced by the Treaty of Amsterdam as an annex to the EC Treaty:

'[The Member States,] considering that the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism, have agreed upon the following interpretative provisions, which shall be annexed to the [EC Treaty],

The provisions of the [EC] Treaty... shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting in so far as

such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and in so far as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account.'

6 Article 1 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1) contains the following definitions:

'(a) "aid" shall mean any measure fulfilling all the criteria laid down in Article [87](1) [EC];

(b) "existing aid" shall mean:

(i) ... all aid which existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty;

(ii) authorised aid, that is to say, aid schemes and individual aid which have been authorised by the Commission or by the Council;

...

(c) "new aid" shall mean all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;

...

(f) "unlawful aid" shall mean new aid put into effect in contravention of Article [88](3) [EC];

...'

7 On 15 November 2001 the Commission of the European Communities published Communication 2001/C 320/04 on the application of State aid rules to public service broadcasting (OJ 2001 C 320, p. 5, 'the Broadcasting Communication'), in which it laid down the principles to which it would adhere in applying Article 86(2) EC and Article 87 EC to the State financing of public service broadcasters.

Background to the dispute

8 After receiving several complaints in 2002 and 2003, mainly from private Netherlands broadcasters, which alleged, in substance, that the system for financing Netherlands public service broadcasters constituted aid incompatible with the common market, the Commission asked the Kingdom of the Netherlands to provide additional information. This led it to adopt a decision, dated 3 February 2004, to initiate the formal

investigation procedure laid down in Article 88(2) EC (OJ 2004 C 61, p. 8, 'the initiating decision').

9 As a result of the formal investigation procedure, on 22 June 2006 the Commission adopted Decision 2008/136/EC on the ad hoc financing of Netherlands public service broadcasters C 2/2004 (ex NN 170/2003) (OJ 2008 L 49, p. 1, 'the contested decision').

10 In the contested decision the Commission described in detail the public broadcasting system in the Netherlands, in particular its actors and financing.

11 It observed that, as well as commercial broadcasters, there were various public service broadcasters. Among the latter, the Nederlandse Omroep Stichting (NOS) (Netherlands Radio and Television Association), the applicant in Case T-237/06, performed a dual role. On the one hand, it is a public service broadcaster operating under the name of NOS RTV ('the NOS RTV'). On the other hand, its management board, which operates under the name of Publieke Omroep (Public Broadcasting, 'the PO'), is entrusted, under Article 16 of the Mediawet (Netherlands Media Act, Stb. 1987, No 249), with the coordination of the entire public service broadcasting system (recital 13 of the contested decision).

12 The Commission also stated in the contested decision that the main sources of funding of the public service broadcasters, including the NOS in its two roles, were the annual payments received from the State. In order to absorb budgetary fluctuations, public service broadcasters are allowed to create reserves. In addition, since 1994

they have received the ad hoc payments to which the contested decision relates. In Title III of the contested decision these are assessed under State aid rules.

13 From its examination of the classification of the financing as State aid, in particular in relation to the criteria set out in the judgment in Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747 ('the *Altmark* judgment'), the Commission concluded that the ad hoc payments constituted State aid within the meaning of Article 87(1) EC (Chapter 6 of the contested decision).

14 On the basis of a number of characteristics of the ad hoc payments (recital 109 of the contested decision), the Commission then reached the conclusion, in recital 111 of the contested decision, that it should be deemed to be new aid.

15 In Chapter 8 of the contested decision the Commission completed its examination of the compatibility of the ad hoc payments under Article 86(2) EC by stating that some public service broadcasters were over-compensated and that the over-compensation was generally transferred to their programme reserves (recital 141). In 2005 part of these reserves was transferred to the PO. The Commission also considered this transfer, which increased the over-compensation, to be an ad hoc payment.

16 After assessing the compensation of the PO, the Commission concluded, in Chapter 9 of the contested decision, that there had been over-compensation of the PO, which should be recovered from the NOS for the functions it performed as the PO (recital 178). That conclusion is followed by the operative part, set out below, the Dutch language version of which is authentic:

'*Article 1*

1. The ad hoc State aid which the [Kingdom of the] Netherlands has granted to the NOS for the functions it performs as [the] PO is incompatible with the common market.

2. The incompatible ad hoc State aid shall be recovered from the NOS. The amount to be recovered is EUR 76.327 million, plus interest.

3. The ad hoc State aid granted by the [Kingdom of the] Netherlands to the individual public service broadcasters is compatible with the common market provided that, in so far as such aid results in over-compensation of the public service mission, the surplus is held in a special purpose reserve, the amount of which does not exceed 10 % of the broadcaster's annual budget and provided that compliance with this limitation is regularly monitored by the [Kingdom of the] Netherlands.

Article 2

1. The [Kingdom of the] Netherlands shall take all necessary measures to recover from the PO the aid referred to in Article 1 and [already] unlawfully made available to the beneficiary.

2. Recovery shall take effect without delay...

3. The interest to be recovered under paragraph 2 shall be calculated in accordance with the procedures laid down in Articles 9 and 11 of Commission Regulation (EC) No 794/2004 ... .

Article 3

The [Kingdom of the] Netherlands shall inform the Commission, within two months of notification of this Decision, of the measures it has already taken and plans to take in order to comply with it. ...

Article 4

This Decision is addressed to the Kingdom of the Netherlands.'

Procedure and forms of order sought

17 By applications lodged at the Registry of the Court on 30 August 2006 and 4 September 2006 respectively and listed as Case T-231/06 and Case T-237/06 respectively, the Kingdom of the Netherlands on the one hand and the NOS on the other hand brought the present actions.

18 In Case T-231/06 the Kingdom of the Netherlands claims that the Court should:

— annul the contested decision with the exception of Article 1(3) thereof;

— order the Commission to pay the costs.

19 The Commission contends that the Court should:

— dismiss the action;

— order the Kingdom of the Netherlands to pay the costs.

20 In Case T-237/06 the NOS claims that the Court should:

— annul the contested decision, in particular Article 1(1) and (2), Article 2 and Article 3 thereof and the considerations on which they are based, and in any event annul that decision in part;

— order the Commission to pay the costs.

21 The Commission contends that the Court should:

— dismiss the action;

— order the NOS to pay the costs.

22 By decision of 9 June 2009 the Court assigned the present cases to the First Chamber (Extended Composition) pursuant to Article 51(1) of the Rules of Procedure of the Court. The composition of the Chamber was altered by decision of the President of the Court of 22 June 2009 as one of the members of the Chamber was prevented from attending.

23 By order of the President of the First Chamber (Extended Composition) of 17 December 2009, after the parties had been heard, Cases T-231/06 and T-237/06 were joined for the purposes of the oral procedure and the judgment, in accordance with Article 50 of the Rules of Procedure.

24 The parties submitted oral argument and their answers to the questions put by the Court at the hearing on 10 March 2010.

Law

25 The Kingdom of the Netherlands raises three pleas in support of its action in Case T-231/06. The first plea alleges infringement of the rights of the defence, the second the incorrect classification of the ad hoc payments as new aid, and the third, raised in

the alternative, is based on errors and the lack of a statement of reasons for the calculation of the over-compensation and the amount of aid to be recovered.

26 The NOS raises six pleas in support of its action in Case T-237/06. The first plea alleges an error of assessment and an inadequate statement of reasons for the classification of the ad hoc payments as new aid. The second plea is based on an inadequate statement of reasons and on an incorrect application of the *Altmark* judgment, cited in paragraph 13 above, in lieu of the Amsterdam Protocol. The third plea alleges breaches associated with the absence of a link between the ad hoc payments and the alleged over-compensation. In the fourth plea, which is divided into three limbs, the NOS pleads the absence of certain factors determining the existence of State aid and the lack of a statement of reasons. The fifth plea of the NOS alleges an inadequate examination of proportionality. The sixth plea is based on a breach of Article 88(2) EC and the rights of the defence.

27 The first plea raised by the Kingdom of the Netherlands and the sixth plea of the NOS alleging infringement of the rights of the defence and breach of Article 88(2) EC must be dealt with together. It will then be necessary to examine together the second and fourth pleas of the NOS on the classification as State aid and the application of the *Altmark* judgment, cited in paragraph 13 above, before considering jointly the second plea of the Kingdom of the Netherlands and the first plea of the NOS alleging the incorrect classification of the measures in question as new aid. Finally, the examination will be concluded with the third plea of the two applicants and the fifth plea of the NOS on the calculation of the over-compensation and the proportionality of the aid.

Infringement of the rights of the defence and breach of Article 88(2) EC

Arguments of the parties

28 Both the Kingdom of the Netherlands and the NOS (taken together 'the applicants') claim in essence that the Commission infringed Article 88(2) EC and their rights to a fair hearing in that the contested decision deviates materially from the initiating decision in several regards.

29 First, according to the applicants, the Commission did not explicitly address the question of the financing of the individual public service broadcasters in the initiating decision. They allege that the contested decision, by contrast, examined the revenues and side activities of these broadcasters and their estimated reserves.

30 Secondly, the applicants state that the method of calculating the over-compensation and the factors taken into account in the initiating decision differ from those used in the contested decision.

31 The NOS adds that in the contested decision the Commission extended the period covered by the formal investigation procedure. Since the Commission had indicated in the initiating decision that the investigation related only to the years from 1992 to 2002, according to the NOS it should have examined only this period in the contested decision.

32 Lastly, the NOS alleges that the changes between the initiating decision and the contested decision constitute an even more serious infringement of its rights of defence in that the Commission refused its requests for meetings and access to the file.

33 The Commission disputes the applicants' arguments.

Findings of the Court

34 According to settled case-law, respect for the rights of the defence is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of specific rules. That principle requires that the person against whom an administrative procedure has been initiated must have been afforded the opportunity, during that procedure, to make known his views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been infringement of Community law (see Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04 *TV 2/Danmark and Others* v *Commission* [2008] ECR II-2935, paragraph 136 and the case-law cited).

35 First, the procedure for reviewing State aid is, in view of its general scheme, a procedure initiated in respect of the Member State responsible, in the light of its Community obligations, for granting the aid. Thus, in order to observe the rights of the defence, where the Member State concerned was not afforded an opportunity to comment on certain information, the Commission may not use that information in its decision with regard to that State (see Joined Cases C-74/00 P and C-75/00 P *Falck*

and Acciaierie di Bolzano v *Commission* [2002] ECR I-7869, paragraph 81 and the case-law cited).

36 Secondly, as regards the rights of undertakings that receive State aid, it is necessary to state that the administrative procedure in State aid matters is initiated only in respect of the Member State responsible. Undertakings that receive aid are considered only to be interested parties in this procedure. It follows that, far from enjoying the same rights of defence as those which individuals against whom a procedure has been instituted are recognised as having, interested parties – such as, in the present case, the NOS – have only the right to be involved in the administrative procedure to the extent appropriate in the light of the circumstances of the case (see, to that effect, *TV 2/Danmark and Others* v *Commission*, cited in paragraph 34 above, paragraph 137 and the case-law cited).

37 Moreover, it should be borne in mind that, under Article 6 of Regulation No 659/1999, where the Commission decides to initiate the formal investigation procedure, it is permissible for its decision merely to summarise the relevant issues of fact and law, to include a preliminary assessment as to the aid character of the State measure in question and to set out its doubts as to the measure's compatibility with the common market (see *TV 2/Danmark and Others* v *Commission*, cited in paragraph 34 above, paragraph 138 and the case-law cited).

38 Thus, a decision to initiate the procedure must give interested parties the opportunity effectively to participate in the formal investigation procedure, during which they will have the opportunity to put forward their arguments. For that purpose, it is sufficient for the parties concerned to be aware of the reasoning which has led the Commission to conclude provisionally that the measure in issue might constitute new aid incompatible with the common market (see *TV 2/Danmark and Others* v *Commission*, cited in paragraph 34 above, paragraph 139 and the case-law cited).

39 In the light of the case-law mentioned above and hence given the difference between the position of the Member State involved and that of the interested parties as regards the rights of the defence in a formal investigation procedure, it is necessary to examine the applicants' argument that the contested decision deviated from the initiating decision to such an extent that the rights of defence of the Kingdom of the Netherlands and the more limited rights that the NOS enjoys as an interested party were infringed.

40 First, as regards the argument that the Commission examined the individual financial situation of the public service broadcasters in greater depth in the contested decision than in the initiating decision, it must be stated first of all that it is clear from the initiating decision, and especially from its title, that it related to the ad hoc measures to Netherlands public service broadcasters and the Nederlandse Omroepproduktie Bedrijf (Netherlands Broadcasting Company, 'the NOB').

41 Moreover, since at the time of the initiating decision the Commission did not have precise information on the possible over-compensation of each of the public service broadcasters but considered that they were over-compensated as a group, it had no option but to initiate the formal investigation procedure in order to satisfy its doubts in this regard. The examination of possible aid granted to the public service broadcasting system necessarily entailed an individual examination of each of the public service broadcasters.

42 The Commission therefore cannot be criticised for not having stated in the initiating decision that it would examine individually the financial situation of each public service broadcaster.

43 The NOS was well aware of the reasoning which led the Commission to conclude provisionally that the measure in issue might constitute new aid and had the opportunity to put forward its arguments, within the meaning of the case-law cited in paragraph 38 above.

44 As regards the Kingdom of the Netherlands, it must be considered, in the light of the requirements of the case-law on respect for the rights of defence of the Member States, that its rights of defence were not infringed in this regard. Contrary to the allegations of the Kingdom of the Netherlands, even supposing that the scope of the enquiry had been widened, it was able to react to the provision of individual data and the fact that the Commission took such data into account up to 2005. It is clear from the file that the Commission asked the Kingdom of the Netherlands for additional information on the individual reserves of the various broadcasters by letter dated 22 December 2005. The Kingdom of the Netherlands replied by a letter of 3 February 2006, which consisted of 18 pages of detailed comments on the Commission's letter of 22 December 2005. This information was discussed between the Commission and the Netherlands authorities on 14 February 2006. In their letter of 3 February 2006 the Netherlands authorities explicitly stated that they noted with satisfaction that the Commission's investigation also covered the years from 2002 to 2005 inclusive. As the contested decision was adopted by the Commission on 22 June 2006, the Netherlands authorities were afforded the opportunity to comment on the taking into account of these data, and in fact did so.

45 On those grounds, the arguments of the applicants in this regard are unfounded and the first complaint must therefore be rejected.

46 Secondly, regarding the argument that the method of calculating the over-compensation and the figures used in the initiating decision were different from those used in the contested decision, it must be stated that the Commission merely found, in the initiating decision, that the sums available in the Fonds Omroep Reserve (Broadcasting Reserve Fund, 'the FOR') and in the public service broadcasters' programme reserves

were an indication of over-funding of the net costs of their public service remit and that, on the basis of the aggregate figures reported in 2001, a total amount of ad hoc financing of EUR 110 million had not been used (recital 105 of the initiating decision).

47 In the contested decision the Commission notes two facts on the basis of the individual figures for public service broadcasters for the period from 1994 to 2005 that it obtained in the course of the formal investigation procedure. First, the individual amount of the public service broadcasters' reserves does not exceed 10 % of their annual budget after the transfer of part of their reserves to the PO (recitals 146 to 149). Secondly, the total amount of aid which the PO received, comprising both new and existing aid, and which it placed in its reserves for the period from 1994 to 2005 amounted to EUR 98.365 million, of which only EUR 76.327 million must be recovered under the new aid procedure; EUR 33.870 million of this sum came from the FOR and EUR 42.457 million consisted of the transfer of reserves from the public service broadcasters in 2005 (recitals 153 and 154).

48 The contested decision therefore differs from the initiating decision in that the Commission used final and individual figures provided by the Netherlands authorities for a period running up to 2005, took into account the transfer of reserves from the public service broadcasters to the PO in 2005 after the adoption of the initiating decision and, in calculating the amount of aid to be recovered, took into consideration only the sums stemming from financing that it regarded as new aid.

49 However, these differences result from data provided to the Commission and from an operation that took place after the initiating decision and in the context of the formal investigation procedure, which makes it possible to examine in greater detail and to

clarify the issues raised in the initiating decision. The Commission could therefore not take account of those data in the initiating decision but had to take them into consideration when adopting the contested decision.

50 Moreover, it follows from Article 7 of Regulation No 659/1999 that, at the end of the formal investigation procedure, the Commission's analysis may have changed, as it may ultimately decide that the measure does not constitute aid or that the doubts as to the compatibility of the measure have been removed. It follows that the final decision may contain certain differences with respect to the initiating decision, without their necessarily vitiating the final decision (judgment of 4 March 2009 in Case T-424/05 *Italy* v *Commission, not published in the ECR, paragraph 69).*

51 Finally, with more particular regard to the line of argument of the Kingdom of the Netherlands in this connection, it is clear from the Commission's letter of 22 December 2005 and from Annex 1 to that letter read in conjunction with the Broadcasting Communication that from that date onwards at the latest the Netherlands authorities were in a position to understand the method that the Commission would use to calculate the over-compensation. The Netherlands authorities could therefore effectively exercise their rights of defence.

52 As a result, the applicants' second complaint must be rejected.

53 Thirdly, as regards the argument of the NOS that in the contested decision the Commission should have examined only the ad hoc payments made during the period from 1992 to 2002 that it had applied in the initiating decision, it must be observed at the outset that in recital 140 of the contested decision the Commission expressly indicated that it related to the ad hoc payments which were paid as of 1994 and covered

the period up to 2005. It also noted first that, although the initiating decision covered the procedure as from 1992, it was not until 1994 that the public service broadcasters received the first ad hoc payments (recital 10 of the contested decision), and secondly that it had final figures only up to 2005, which justified the fact that it did not take into account the figures provided by the Kingdom of the Netherlands for 2006 (recitals 10 and 139 of the contested decision).

54 It must first be stated that in recital 4 of the initiating decision the Commission indicated explicitly that the formal investigation procedure covered the period beginning in 1992. The initiating decision therefore set no time-limit as to the end of the period under examination.

55 Furthermore, the argument that in the initiating decision the Commission made statements relating only to the period from 1992 to 2002 is unfounded, since it is clear from recital 47 of the initiating decision that the Commission took account of some specific figures for the period from 2001 to 2006. For the sake of completeness, such an argument is, moreover, ineffective, since in the initiating decision the Commission did not in any way exclude the possibility that its investigation might cover the years after 2002.

56 The argument of the NOS based on the extension of the period concerned in the contested decision must therefore be rejected.

57 Fourthly, as regards the argument of the NOS that it did not have an opportunity to explain its position to the Commission at a meeting, it must be stated first of all that the NOS asserts that the Commission approved the transfer of the public service broadcasters' reserves to the PO 'at the meeting held on 28 June 2005 between

the representatives of the NOS and the [Member of the Commission responsible for questions of] competition'. Hence the NOS participated at that meeting on 28 June 2005 as well as the one held on 14 February 2006, but it nevertheless alleges that this did not constitute an *inter partes* procedure. In this regard, it must be added that, as an interested party, the NOS could not in any case claim the rights of defence accorded to the Member State concerned (see the case-law cited in paragraph 36 above).

58 It must then be found that, as the Commission states, the NOS sent it a letter on 21 April 2004, in which it states that it is presenting its comments on the initiating decision in its capacity as a 'direct interested party' and in particular on behalf of the public service broadcasters. By letter dated 8 March 2005 the NOS also asked the Commission for clarifications.

59 Consequently, as well as being cited in the initiating decision, the NOS was involved in the procedure, in accordance with the case-law cited in paragraph 36 above.

60 Lastly, whereas the NOS claims that its request for access to the file was refused, it is sufficient to observe that it provides no evidence to support such a request or such a refusal.

61 Hence the Commission did not infringe Article 88(2) EC or the rights of defence of the Kingdom of the Netherlands and the more limited rights which the NOS enjoys as an interested party, so that the first plea of the Kingdom of the Netherlands and the sixth plea of the NOS must be rejected.

The wrong classification of the ad hoc payments as State aid

62 In various regards and in several pleas which must be examined together, the NOS disputes the Commission's assessment of the ad hoc payments under State aid rules in the contested decision. In its fourth plea the NOS claims, in a first limb, that the revenues of the Coproductiefonds Binnenlandse Omroep (the Co-Production Fund, 'the CoBo Fund') are wrongly classified as State resources, in a second limb that the NOS is not an undertaking in the functions it performs as the PO, and in a third limb that there is no distortion of competition and that the decision fails to state reasons in this regard. In its second plea the NOS disputes the interpretation and application of the *Altmark* judgment, cited in paragraph 13 above, which the Commission makes in examining the economic advantage of the ad hoc payments and again alleges a lack of a statement of reasons in this regard.

The wrongful classification of the revenues of the CoBo Fund from copyright fees as State resources

— Arguments of the parties

63 According to the NOS, the copyright fees paid by Belgian and German cable operators are a source of funding that is independent of the public service remit. The NOS claims that under Netherlands law the participation of public broadcasters in the cable transmission of their programmes abroad is regarded as a side activity. It

maintains that the sums paid are clearly private funds and not State resources within the meaning of Article 87(1) EC.

64 The NOS alleges that it deposits the copyright fees paid by foreign cable operators in the CoBo Fund, which is managed by the public service broadcasters. It maintains that the fact that the authorities place conditions on the use of these funds does not in any way change the private nature of their source.

65 The Commission considers this limb to be ineffective, since the PO received no financing from the CoBo Fund. In addition, it disputes the alleged private nature of the resources in the CoBo Fund.

— Findings of the Court

66 At the hearing the NOS stated, in reply to a question from the Court, that its pleas for annulment did not relate to Article 1(3) of the contested decision. It must therefore be found that the first limb of its fourth plea is ineffective.

67 The NOS seeks the annulment of Article 1(1) and (2) of the contested decision declaring the State aid granted to the NOS in its role as the PO to be incompatible with the common market and ordering its recovery. However, it is clear from recital 45 of the contested decision and from the table in recital 152 that the PO did not receive any payments from the CoBo Fund. Hence the resources in the CoBo Fund are not part of the State aid that the PO is alleged to have received and whose recovery is ordered.

68 The first limb of the fourth plea raised by the NOS must therefore be rejected.

The fact that the NOS is not an undertaking in its role as the PO

— Arguments of the parties

69 While recognising that it has the status of an undertaking in its activities associated with radio and television programmes, the NOS maintains that it is not an undertaking for the purposes of Article 87(1) EC in the management and coordination of the public broadcasting system. According to the NOS, the distinction between these two types of activity is clear from Article 16 of the Mediawet and the fact that separate accounts are kept for each activity.

70 Hence, in the view of the NOS the contested decision is vitiated, since the Commission failed to examine the facts adequately, wrongly categorised the NOS as an undertaking, incorrectly interpreted Articles 87 EC and 88 EC and provided an inadequate statement of the reasons for its assessment that the NOS was over-compensated as an undertaking. According to the NOS, its activities managing and coordinating the public broadcasting system are not commercial activities taking place on a market. In that regard, the NOS refers to the decision of the Netherlands competition authority of 29 September 2005 in Case 5059/NOS-NOB, in which the authority allegedly considered that the activities of the NOS as a broadcaster constituted commercial

activities but that the NOS was not an undertaking in the performance of the public interest tasks assigned to it by law.

71 The NOS observes that, as is clear from the case-law, public institutions or bodies linked to them may be undertakings for the purposes of Article 87(1) EC to the extent that they engage in commercial activities but that they do not have that status for their activities associated with the performance of tasks assigned to them by law.

72 Hence, according to the NOS, it was not as an undertaking that the NOS received EUR 33.8 million in ad hoc financing, because those payments related to the tasks that it is obliged to perform under the Mediawet. In its view, it could therefore be considered in this respect as an association of undertakings for the purposes of Article 81(1) EC, but that was not sufficient to confer on it the status of an undertaking.

73 According to the NOS, the reserves accumulated by the public sector broadcasters had ceased to be State aid favouring an undertaking, as they had been transferred to the PO. The NOS alleges that it received these sums for managing public service activities and could use them in accordance with the law.

74 Moreover, the NOS maintains that none of the tasks listed by the Commission in its submissions in connection with its activities managing and coordinating the public broadcasting system means that it must be regarded as an undertaking offering goods or services on a market. In that regard, in accordance with the case-law, the Commission should, in the view of the NOS, have determined which were the activities from which it derived revenues and the nature of those revenues.

75 The NOS maintains first of all that when selling programme rights to foreign cable operators or in connection with satellite broadcasting it was not acting as an independent body but was an administrative intermediary defending the interests of third parties, namely the public service broadcasting organisations.

76 Furthermore, the receipt of interest, leasing income and dividends was, according to the NOS, connected with the financial management of the NOS, in the same way as any other public institution.

77 Finally, the NOS maintains that its retransmission activities were not associated with its management and coordination of the public service broadcasting system.

78 The Commission disputes the arguments of the NOS.

— Findings of the Court

79 As a preliminary point, it must be borne in mind that the obligation to state reasons is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure (see Case T-93/02 *Confédération nationale du Crédit mutuel* v *Commission* [2005] ECR II-143, paragraph 67 and the case-law cited).

80 The statement of reasons required under Article 253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63, and *TV 2/Danmark and Others* v *Commission*, cited in paragraph 34 above, paragraph 178).

81 According to its title, the contested decision relates to the ad hoc financing of Netherlands public service broadcasters, whose status as undertakings is not in dispute. In Chapter 2 of the contested decision the Commission described in detail the entire public broadcasting system, beginning with its actors. It included the NOS in this description, in its roles both as the NOS RTV and as the PO (see paragraph 11 above).

82 The Commission examined the sources of funding of these actors, including those of the NOS in its dual role (recital 14 of the contested decision), and found that they received primarily annual payments from the State, were allowed to create reserves and in addition had received ad hoc payments since 1994 (recital 33 of the contested decision).

83 In its description of the ad hoc payments, in Section 2.3.3 of the contested decision, the Commission examined the payments from the FOR (recitals 39 to 42). It stated that the purpose of the FOR was to finance certain PO initiatives and to make it possible

for the PO to give a qualitative impetus, improve programming and invest in the public broadcasters. The Commission pointed out that by 2005 the public broadcasting system had received EUR 191.2 million from the FOR, of which EUR 157.4 million had been transferred to the public service broadcasters and EUR 33.8 million to the PO (recital 42 of the contested decision).

84 The Commission then assessed these ad hoc payments under the State aid rules, including those paid by the FOR to the PO. The amount of EUR 191.2 million mentioned in recital 87 of the contested decision includes the amount of EUR 33.8 million paid to the PO (see paragraph 83 above).

85 The Commission ascertained, primarily in regard to this financing from the FOR, the presence of State resources (Section 6.1 of the contested decision) and an economic advantage (Section 6.2 of the contested decision). It then examined the criteria for distortion of competition (Section 6.3 of the contested decision) and for effects on trade between Member States (Section 6.4 of the contested decision), again in relation to the actors in the public broadcasting system. The Commission concluded in recital 105 of the contested decision that the ad hoc payments constituted State aid to the public service broadcasters, including the NOS.

86 Since according to the Commission and, moreover, according to the Netherlands authorities (see, with regard to the latter, recital 76 of the contested decision) the public service broadcasters are entrusted with a public service mission, the compatibility of the ad hoc payments under Article 86(2) EC was then examined in Chapter 8 of the contested decision.

87 In assessing the compensation received by the various public service broadcasters, the Commission found that 14 of them were over-compensated in the period from 1994 to 2005 and that the over-compensation generally flowed into the programme reserves (recitals 141 and 146 of the contested decision).

88 In this context and at this stage in the investigation the Commission noted that in 2005 part of these reserves had been transferred to the PO, reducing the overall compensation of the individual public service broadcasters while increasing the over-compensation of the PO (recital 146 of the contested decision). The over-compensation of the latter is calculated by the Commission from the PO's separate accounts. The Commission indicated that although the NOS RTV and the PO were parts of a single legal entity and presented consolidated accounts, under no circumstances did they have access to each other's funds (recital 151 of the contested decision).

89 It is clear from Table 4 in recital 152 of the contested decision that the ad hoc payments to the PO which are subject to the recovery order are the payments from the FOR, which were taken into account when examining their classification as State aid (see paragraphs 83 to 85 above), and the transfer of reserves (see paragraph 87 above), which were also included in the ad hoc payments (recital 146 of the contested decision).

90 Contrary to the allegations of the NOS, the Commission thus carried out an adequate examination of the facts, and the statement of reasons for its conclusions as to the presence of ad hoc payments constituting State aid to the public service broadcasters, including the NOS, and of the over-compensation of the public service remit — solely with regard to the functions performed by the NOS as the PO — which must therefore be recovered from the NOS (Article 1(1) and (2) of the contested decision in the authentic language version) is sufficient in law.

91 As regards the soundness of the statement of reasons, the NOS errs in stating that it does not constitute an undertaking in its role as the PO.

92 The Court of Justice has consistently held that, in the context of competition law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed. It has also been consistently held that any activity consisting in offering goods and services on a given market is an economic activity (see Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraphs 74 and 75 and the case-law cited).

93 It should also be borne in mind that, according to the case-law of the Court of Justice, activities which fall within the exercise of public powers are not of an economic nature justifying the application of the Treaty rules of competition (see, to that effect, Case C-364/92 *SAT Fluggesellschaft* [1994] ECR I-43, paragraph 30, and Case C-113/07 P *SELEX Sistemi Integrati* v *Commission and Eurocontrol* [2009] ECR I-2207, paragraph 70).

94 The Court of Justice has also already held that the fact that a body is entrusted with some public interest tasks does not prevent the activities at issue from being regarded as economic activities (see, to that effect, Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 21, and Case C-237/04 *Enirisorse* [2006] ECR I-2843, paragraph 34).

95 In order to determine whether, in the present case, the activities of the NOS are those of an undertaking within the meaning of the Treaty, it is necessary to establish the nature of those activities (see, to that effect, *SAT Fluggesellschaft*, cited in paragraph 93 above, paragraph 19).

96 As the Court has already stated in paragraphs 11 and 81 above, the primary role of the NOS is as a public broadcaster, for which it is not disputed that it constitutes an undertaking, even though it is entrusted with a public service mission.

97 The second role of the NOS is carried out by its management board, the PO, through which it is entrusted, in particular, with stimulating cooperation between public broadcasters, coordinating the three public television channels and reporting twice a year on the public broadcasters' activities to the Media Authority (recital 13 of the contested decision and Article 16 of the Mediawet). The Kingdom of the Netherlands indicated at the hearing, however, that the PO should not be regarded as a body independent of the public broadcasters. The PO manages and coordinates the entire system and, in order to examine the method of financing, it is necessary to consider the public broadcasting system as a whole, of which the PO forms a part.

98 First, in performing this task of coordinating and managing the public broadcasters, the NOS cannot be regarded as a public authority exercising public powers.

99 On the one hand, such a coordination and management role does not imply the exercise of public powers. Furthermore, the NOS provides no evidence to establish that the PO exercises public powers. Moreover, in accordance with the case-law cited in paragraph 94 above, the mere fact that the NOS is entrusted with some public interest tasks does not prevent the activities at issue from being regarded as economic activities. Nor does the NOS demonstrate that its public interest tasks are not of an economic nature.

100 On the other hand, the coordination and management role entrusted to the NOS relates only to the public broadcasters and is linked to their economic activity of providing and distributing television programmes, despite the fact that there are several commercial broadcasters operating on a national level (recital 18 of the contested decision).

101 As the Commission points out in its reply to the written questions put by the Court, the coordination activities carried out by the NOS through the PO are no different from those performed by a commercial undertaking for its commercial channels. The presence of several public broadcasters necessitates central coordination. The NOS therefore performs some tasks which would otherwise have to be carried out by the undertakings themselves or which they would at least have to organise or finance.

102 Secondly, it is clear from Table 4 in recital 152 of the contested decision that the PO also has revenues from commercial activities totalling the not insignificant sum of EUR 133.7 million over the period in question. It is apparent from the letter of 24 February 2006 from the Netherlands authorities to the Commission that the PO derives revenues in particular from the sale of programme rights to Belgian and German cable operators, satellite broadcasting, various types of promotion and the provision of services to broadcasters or third parties and that it receives, in particular, interest, leasing income, dividends and management fees.

103 The NOS does not dispute the existence of these revenues, but considers that it acts merely as an administrative intermediary, especially for the sale of programme rights to Belgian and German cable operators. First, the intermediary role that the NOS claims to have performed in connection with the sale of rights cannot alter the fact that this is an economic activity (see the case-law cited in paragraph 92 above). Secondly, the intermediary activity performed by economic operators is itself an economic activity.

104 Lastly, contrary to the allegations of the NOS, in its decision of 29 September 2005 the Netherlands competition authority did not rule on the status of the NOS as an undertaking in carrying out its public interest tasks. After noting the status of the NOS as an undertaking engaging in economic activities, it considered that the fee received by the NOS for its broadcasting activities (NOS RTV) could be considered as a component of turnover.

105 Consequently, even considered in isolation, the activity of the NOS in its role as the PO is an economic activity within the meaning of the case-law cited. The Commission was therefore entitled to consider the NOS to be an undertaking in the contested decision, in particular for the purposes of applying the State aid rules (Article 87 EC), despite the fact that it performs a dual role under its public service remit.

106 As none of the arguments put forward by the NOS is well founded, the second limb of its fourth plea must be rejected.

The absence of distortion of competition and the lack of a statement of reasons in this regard

— Arguments of the parties

107 The NOS maintains that the Commission's assessment that the ad hoc payments may distort competition lacks an adequate statement of reasons, is wrong in part and contradicts other findings of the Commission in the contested decision.

108 First, in its application the NOS claims that the reasoning for the contested decision is circular. Moreover, it contends that the Commission wrongly suggests that where State aid exists it is automatically established that competition is distorted. Lastly, it claims that the Commission failed to state, as required by the case-law, the manner in which the measures in question might distort competition.

109 In addition, the NOS contends that the Commission wrongly considered that competition had been distorted in the case at issue. According to the NOS, over-compensation does not mean in the present case that the excess amounts received could have been used for purposes other than the performance of its public service remit and could thus have distorted competition on other markets. In the view of the NOS, the Commission should therefore have ascertained whether, and to what extent, the creation of reserves had distorted competition on the market.

110 Lastly, the NOS claims that the Commission's assessment that competition was distorted contradicts the assertion, in recital 155 et seq. of the contested decision, that there was no anti-competitive behaviour on the three important markets in which public and private broadcasters are in competition.

111 Secondly, in its rejoinder the NOS maintains that, as the Commission notes in its submissions, in order to determine whether an aid is existing or new it is necessary to take account of the legal basis of the measure, any changes to the measure and whether those changes transform the initial measure into a new measure. According to the NOS, the Commission did not apply these three criteria correctly.

112 The Commission disputes the arguments of the NOS. Moreover, it observes that the line of argument set out by the NOS in its rejoinder has no connection with the heading of the third limb of the fourth plea and the arguments set out in the application.

— Findings of the Court

113 It must be stated at the outset that the arguments that the NOS sets out in its rejoinder in connection with the third limb of its fourth plea relate to the classification of new aid, which is the subject of its first plea, and cannot be treated as a separate plea in law. This line of argument has no connection with the one set out in its application or with the heading of this limb. It is therefore necessary to limit examination of this limb of the fourth plea adduced by the NOS to the alleged absence of distortion of competition and the lack of a statement of reasons in the contested decision in this regard and to refer to paragraphs 159 to 198 below for the remainder (see, in particular, paragraphs 176 to 180 below for the distinction between existing aid and new aid and paragraphs 182 to 188 below for the characteristics of new aid in the present case).

114 With regard to the alleged failure to state reasons, in the detailed description of the public broadcasting system the Commission states in recital 18 of the contested decision that, in addition to the public service broadcasters, there are several commercial broadcasters operating on a national level. It is in fact the latter that lodged complaints with the Commission alleging that the public funding system in place for Netherlands public broadcasters constituted unlawful State aid within the meaning of Article 87(1) EC (recital 1 of the contested decision).

115 The contested decision contains a Section 6.3 entitled 'Distortion of competition', the sole recital of which reads as follows:

'The advantage provided by the ad hoc financing, the transfers to the CoBo Fund and the provision of free technical facilities to the Dutch public service broadcasters are not available to any other undertaking in a comparable situation. Given that competition is distorted whenever State aid reinforces the competitive position of the beneficiary undertaking vis-à-vis its competitors, the advantage is capable of distorting competition between the public service broadcasters and other undertakings.'

116 In Section 6.4 of the contested decision the Commission then examined the effect of the ad hoc payments on trade between the Member States. After referring to the applicable case-law and to the Broadcasting Communication, the Commission states the following in recital 103 of the contested decision:

'In the present case, the Dutch public broadcasters are themselves active on the international market. Through their membership of the European Broadcasting Union they can exchange television programmes and participate in the Eurovision system. Moreover, their programmes are broadcast in Belgium and Germany. Furthermore, the Dutch public broadcasters are in direct competition with commercial broadcasters that are active on the international broadcasting market and that have an international ownership structure.'

117 It must therefore be found that, contrary to the allegations of the NOS, the contested decision contains a statement in this regard that makes it possible for the NOS to understand the Commission's reasoning and to prepare its defence and enables the Court to exercise its power of review (see the case-law cited in paragraph 80 above). According to the Commission, it is in relation to their competitors, that is to say,

commercial broadcasters, that there is to be found the advantage likely to distort competition that is granted to the public broadcasters, including the NOS, even in its role as the PO.

118 To the extent that the NOS also disputes the validity of the reasons stated (see the case-law cited in paragraph 79 above) by relying on the absence of a distortion of competition in the present case, it must be recalled, first, that Article 87(1) EC prohibits aid granted by the Member States which distorts 'or threatens to distort competition' by favouring certain undertakings. The danger or threat of distorting competition is therefore a sufficient reason. The Commission is not bound to demonstrate the real effect of aid already granted (see, to that effect, Joined Cases C-346/03 and C-529/03 *Atzeni and Others* [2006] ECR I-1875, paragraph 74). Hence, in the present case the Commission did not have to demonstrate that the beneficiaries of the measures in question – that is to say, the public service broadcasters, including the NOS in its dual role – used the funds they had received for other purposes, thereby distorting competition.

119 *Secondly,* according to settled case-law, aid which is intended to relieve an undertaking of the expenses which it would normally have had to bear in its day-to-day management or its usual activities in principle distorts competition (see Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, paragraphs 48 and 77 and the case-law cited; Case T-214/95 *Vlaamse Gewest* v *Commission* [1998] ECR II-717, paragraph 43; and Case T-217/02 *Ter Lembeek* v *Commission* [2006] ECR II-4483, paragraph 177).

120 The financing granted to the NOS, both as the PO and as the NOS RTV, relieves it of operating costs that it would otherwise have to bear, as the Commission states in recital 93 of the contested decision. The fact that it is entrusted with a public service remit and performs its tasks in accordance with the provisions governing that remit does not of itself eliminate the risk of a distortion of competition in relation to other undertakings, short of depriving Articles 86 EC to 88 EC of all effectiveness, as the

Commission maintains. Under Article 86(2) EC, undertakings entrusted with a public service remit are subject to the rules contained in the Treaty, in particular the rules on competition. The public service remit may be over-compensated by the Member State in question, which, where such over-compensation is established, itself carries a risk of distortion on a market open to competition, such as the broadcasting market.

121 Moreover, as regards the argument that the finding of a distortion of competition in recital 100 of the contested decision contradicts the Commission's conclusion that no anti-competitive behaviour had taken place, it must be pointed out that the analysis of the effect on competition (Section 6.3 of the contested decision) forms part of the examination of the existence of aid within the meaning of Article 87(1) EC (Chapter 6 of the contested decision). By contrast, the anti-competitive behaviour of the public service broadcasters is the subject of Section 8.5 of the contested decision in the context of the examination of the compatibility of the measures in question with Article 86(2) EC.

122 It is clear that the case-law draws a distinction between the question of classifying a measure as State aid and that of its compatibility with the common market (Case T-354/05 *TF1* v *Commission* [2009] ECR II-471, paragraph 134). The Commission was therefore right, in the contested decision, to verify in the first place whether the conditions laid down in Article 87(1) EC for the measure in question to be classified as State aid were met in the present case, thus including its ability to distort competition, and then to examine whether the exemption under Article 86(2) EC was applicable. In the latter context, in accordance with the Amsterdam Protocol, it is necessary to check in particular whether the public service broadcasters engage in anti-competitive behaviour in the commercial markets that is not necessary for the performance of their public service remit (see, in that regard, paragraphs 211 to 218 below).

123 The fact that no specific anti-competitive practices could be identified in the examination of the proportionality of this compensation therefore does not conflict with the Commission's findings regarding the distortion of competition for the purpose of classifying the ad hoc payments as State aid. Indeed, it remains true that these payments are likely to distort competition within the meaning of Article 87 EC, as stated by the Commission in recital 100 of the contested decision.

124 The third limb of the fourth plea raised by the NOS must therefore be rejected.

The incorrect interpretation and application of the *Altmark* judgment, cited in paragraph 13 above, and the inadequate statement of reasons for the contested decision in this regard

— Arguments of the parties

125 The NOS claims, in essence, that the Commission's assessment that the ad hoc payments constitute new aid is based on an incorrect interpretation and application of the *Altmark* judgment, cited in paragraph 13 above, and on an inadequate statement of reasons.

126 First, the NOS maintains that the Commission wrongly considered that the *Altmark* judgment, cited in paragraph 13 above, applied to the case in point.

127 According to the NOS, the *Altmark* judgment, cited in paragraph 13 above, defines the conditions which enable a national court to determine whether an aid should or should not be notified to the Commission, but is not the appropriate legal framework for determining whether a measure constitutes State aid, which in the view of the NOS is a purely substantive question.

128 Moreover, in the view of the NOS, the *Altmark* judgment, cited in paragraph 13 above, lays down primarily procedural conditions. Hence, as regards the condition that fixed criteria must first be used to determine the compensation of public service costs, a measure which does not meet that condition may nevertheless not constitute State aid if the compensation granted does not exceed the public service costs. Similarly, according to the NOS, as is evident from Commission Communication 97/C 209/03 on State aid elements in sales of land and buildings by public authorities (OJ 1997 C 209, p. 3), the condition that the sale was made by means of a tendering mechanism is purely procedural in nature.

129 Moreover, according to the NOS, the *Altmark* judgment, cited in paragraph 13 above, deals with situations in which a private operator occasionally assumes public service obligations, which are of limited scope and are 'placed' on the market fairly frequently. The NOS maintains that in the present case, by contrast, the Netherlands public service broadcasting system is different in that it is a permanent financing system. There was therefore no question of the award of contracts or comparison with an efficient commercial operator.

130 Secondly, the NOS asserts that it is in the light of the Amsterdam Protocol, a source of primary law, that the Commission should have made a preliminary assessment whether State aid was present. Under that protocol, in the opinion of the NOS, State aid can exist only if there is over-compensation affecting competition to an extent that is contrary to the interests of the Community. Consequently, the ad hoc

payments received by the NOS cannot be regarded as State aid and the Commission thus wrongly interpreted Articles 87 EC and 88 EC.

131 According to the NOS, there can be no State aid if there is no advantage, irrespective of whether the conditions laid down in the *Altmark* judgment, cited in paragraph 13 above, are fulfilled, as is clear from Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2)[EC] to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ 2005 L 312, p. 67).

132 Lastly, the NOS claims that the Commission wrongly concludes, in referring to the *Altmark* judgment, cited in paragraph 13 above, that the provision of technical facilities by the NOB to the public service broadcasters constitutes State aid, whereas the NOB is paid by the State for providing those facilities and that compensation is paid out of the resources that the State provides to the NOS.

133 Thirdly, the NOS maintains that the Commission did not state adequate reasons for its assessment, set out in recital 96 of the contested decision, that the payments from the FOR, the matching funds and the CoBo Fund are not based on objective and transparent parameters established in advance.

134 The Commission disputes the line of argument put forward by the NOS and states that it does not understand the purpose of the plea owing to the lack of clarity in the arguments raised.

— Findings of the Court

135 At the outset, the argument of the NOS concerning the provision of technical facilities by the NOB to the public service broadcasters must be rejected as ineffective. It is clear from recital 137 of the contested decision that the Commission considered that it was not necessary to include that measure in its calculations. Hence it is not taken into account in assessing the over-compensation of the public service broadcasters nor, a fortiori, in the amount of over-compensation received by the PO, the only aspect covered by the annulment sought.

136 As regards, first, the statement of reasons for the contested decision in relation to the *Altmark* judgment, cited in paragraph 13 above, the Commission states in recital 93 of that decision that the ad hoc financing provides an economic advantage to the Netherlands public service broadcasters, in the sense that these measures relieve them of operating costs that they would otherwise have to bear.

137 In Section 6.2.1 of the contested decision entitled 'Applicability of the *Altmark* judgment' the Commission then replies to the argument of the Netherlands authorities and broadcasters that the ad hoc payments compensate the latter for the net costs of discharging their public service mission. It is indicated in the final sentence of recital 94 of the contested decision that this would imply that the ad hoc payments therefore do not provide an advantage to public service broadcasters or constitute aid, in line with the conditions laid down in the *Altmark* judgment, cited in paragraph 13 above.

138 The Commission then lists, in recital 95 of the contested decision, the conditions that have to be satisfied in accordance with the *Altmark* judgment, cited in paragraph 13 above, for State measures compensating for the net additional costs of a service of general economic interest (SGEI) not to be classified as State aid.

139 Lastly, in recitals 96 to 98 of the contested decision, the Commission states reasons for its conclusion, set out in recital 99 of that decision, that the last three of these conditions are not fulfilled in this case.

140 First, according to the Commission, the transfer of funds from the FOR, the matching funds and the financial contribution from the CoBo Fund were not based on objective and transparent parameters established in advance. Secondly, neither the ad hoc financing measures nor the payments from the CoBo Fund take into account all the relevant receipts of the public service broadcasters and they do not include the necessary safeguards to exclude over-compensation. Indeed, the ad hoc funding actually resulted in considerable over-compensation. Thirdly, the Netherlands public broadcasters were not chosen as providers of a service of general economic interest on the basis of a tender. Moreover, no analysis was carried out to ensure that the level of compensation was determined on the basis of an assessment of the costs which a typical undertaking, well run and adequately provided with the means of production so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations.

141 It must therefore be stated that, contrary to the allegations of the NOS, in the circumstances of the present case and in particular in the light of the content of the contested decision and the descriptions it contains of the various forms of financing referred to in recitals 35 to 45 thereof, the statement of reasons for the decision enables the persons concerned to ascertain the reasons for the Commission's conclusions

on non-compliance in the present case with the criteria set out in the *Altmark* judgment, cited in paragraph 13 above, and also enables the Court to exercise its power of review.

142 In the contested decision the Commission set out sufficiently clearly the facts and legal considerations of essential importance in the scheme of the decision (see, to that effect, *Ter Lembeek* v *Commission*, cited in paragraph 119 above, paragraph 246).

143 Secondly, the argument put forward by the NOS in its application that the conditions set out in the *Altmark* judgment, cited in paragraph 13 above, were addressed exclusively to the national court has no legal basis and finds no support in the judgment cited.

144 Indeed, it is clear from paragraphs 87 to 94 of the *Altmark* judgment, cited in paragraph 13 above, that the principles which the Court of Justice set out therein are of general application, even though they were formulated in the context of an application for a preliminary ruling from a national court. The Court did not limit the principle laid down in the *Altmark* judgment, cited in paragraph 13 above, to the case at issue or restrict its application to the national court or preclude its application to the public broadcasting sector.

145 In *TF1* v *Commission*, cited in paragraph 122 above, paragraph 130, the General Court stated that it is clear from the entirely unequivocal terms of the *Altmark* judgment, cited in paragraph 13 above, that the sole purpose of the four conditions which it laid down is the classification of the measure in question as State aid, and more specifically the determination of the existence of an advantage.

146 State intervention which does not meet one or more of those conditions must be regarded as State aid within the meaning of Article 87(1) EC (*TF1* v *Commission*, cited in paragraph 122 above, paragraph 129).

147 The Netherlands authorities and the public service broadcasters explicitly state in the present case that the ad hoc payments compensate the latter for the net costs of discharging their public service mission. Hence, when examining the economic advantage, the Commission was right to verify whether in the present case the conditions laid down in the *Altmark* judgment, cited in paragraph 13 above, were fulfilled and, in doing so, it did not commit an error of assessment.

148 It must also be noted that although the NOS disputes the application in the present case of the *Altmark* judgment, cited in paragraph 13 above, it does not question the Commission's conclusion in recital 99 of the contested decision that the conditions set out in the *Altmark* judgment, cited in paragraph 13 above, are not fulfilled. The NOS provides no evidence to refute the reasons stated by the Commission in recitals 96 to 98 of the contested decision.

149 Thirdly, it must be pointed out that the Amsterdam Protocol does not exclude the possibility that the financing of the public broadcasting service may constitute State aid. Indeed, it lays down that the provisions of the Treaty shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting in so far as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and in so far as such funding does not affect trading conditions and competition in the European Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account. The NOS therefore cannot claim that the Amsterdam Protocol sets aside the application of the competition rules and prevents the Commission from examining whether the ad hoc financing provides an economic advantage to the

Netherlands public service broadcasters on the basis of the criteria laid down by the Court of Justice in the *Altmark* judgment, cited in paragraph 13 above.

150 Moreover, the Commission does not dispute the fundamental role of the Amsterdam Protocol in assessing financing granted to broadcasting organisations for the fulfilment of their public service remit. The Commission makes reference to the protocol in recital 122 of the contested decision, which is part of Chapter 8, entitled 'Compatibility of the aid under Article 86(2) [EC]'. The Commission also based this assessment on the case-law (recitals 113 and 114 of the contested decision) and on the Broadcasting Communication, which refers in particular to the Amsterdam Protocol. It therefore cannot be argued that the Commission failed to take account of that protocol.

151 Fourthly, nor does Decision 2005/842 endorse the argument that in the present case the Commission wrongly applied the *Altmark* judgment, cited in paragraph 13 above.

152 Indeed, in accordance with recital 5 of Decision 2005/842:

'Where [the four criteria of the *Altmark* judgment] are met, public service compensation does not constitute State aid, and Articles 87 [EC] and 88 [EC] do not apply. If the Member States do not respect those criteria and if the general criteria for the applicability of Article 87(1) [EC] are met, public service compensation constitutes State aid that is subject to Articles 73 [EC], 86 [EC], 87 [EC] and 88 [EC]. This Decision

should therefore only apply to public service compensation in so far as it constitutes State aid.'

153 Moreover, Article 1 of Decision 2005/842 provides that the decision in question sets out the conditions under which State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest is to be regarded as compatible with the common market and exempt from the requirement of notification laid down in Article 88(3) EC.

154 It follows that Decision 2005/842 does not in any way itself define the conditions which public service compensation must fulfil, in particular as regards the advantage obtained, in order to escape classification as State aid; on the contrary, it applies to measures already classified as State aid whose compatibility with the common market must be determined. Moreover, contrary to the allegations of the NOS, Decision 2005/842 refers explicitly to the criteria laid down by the Court of Justice in the *Altmark* judgment, cited in paragraph 13 above, in order to establish, at the previous stage, whether compensation constitutes State aid.

155 In the contested decision, the Commission was therefore right first to examine whether the criteria laid down by the Court of Justice in the *Altmark* judgment, cited in paragraph 13 above, were fulfilled in order to establish whether the ad hoc payments constituted State aid and then, having concluded that State aid existed, to examine whether it was compatible with the common market (see, to that effect, *TF1* v *Commission*, cited in paragraph 122 above, paragraphs 134 to 147).

156 Finally, the argument which in its rejoinder the NOS appears to wish to base on the reference to Commission Communication 97/C 209/03 on State aid elements in sales of land and buildings by public authorities is in any event of no relevance. In the

present case the contested decision relates to the broadcasting sector and not to the sale of land and buildings. The analogy raised is therefore entirely without foundation.

157 As none of the arguments put forward by the NOS in support of its second plea is well founded, that plea must be rejected.

158 The NOS has therefore failed to establish that the Commission's conclusions in the contested decision regarding the classification of the ad hoc payments as State aid are incorrect and lack a statement of reasons.

The incorrect classification of the ad hoc payments as new aid and the lack of a statement of reasons in this regard

Arguments of the parties

159 The applicants claim, in essence, that the Commission infringed Article 88 EC and Regulation No 659/1999 by classifying the ad hoc payments as new aid. They also maintain that the contested decision lacked an adequate statement of reasons in this regard.

160 In their view, the Commission wrongly distinguished between the ad hoc payments and regular annual payments from the State. Like the latter, the ad hoc payments did not constitute an automatic provision of funds. The applicants maintain that these

two types of payment were granted by a special decision of the competent minister. Moreover, both the ad hoc payments and the regular annual payments were granted for the fulfilment of specific objectives, namely the performance of tasks assigned to the public service broadcasting system under Article 13c of the Mediawet.

161 First, the applicants allege that the ad hoc payments in the form of matching funds, funding from the FOR and contributions from the CoBo Fund are part of the system of regular financing of the public service broadcasters. They maintain that the ad hoc payments come from the same source as regular annual payments, that is to say, the media budget established before 1958, and are subject to the same financial rules, the principles of which pre-date 1958. According to the applicants, the ad hoc payments have not undergone any substantial change, since they continue to come from the Algemene Omroep Reserve (General Broadcasting Reserve, 'the AOR').

162 The applicants rely on the judgment in Case C-44/93 *Namur-Les assurances du crédit* [1994] ECR I-3829. In their view, it is clear from that judgment that new activities performed by an undertaking receiving funding under an existing system must be regarded as existing aid and the fact that a new legal basis has been established for funding is not sufficient to consider that the measure in question constitutes new aid. They claim that it is clear from the case-law that the manner in which the funds are provided is not a decisive factor for classifying aid as new aid or existing aid.

163 According to the applicants, the assessment that the ad hoc payments are distinct from regular annual payments because they have a different legal basis is wrong in fact.

164 Secondly, the applicants claim that the Commission wrongly classified as new aid the measure providing for part of the public service broadcasters' programme reserves to be transferred to the PO. The Kingdom of the Netherlands adds that the Commission failed to provide an adequate statement of reasons for that classification.

165 According to the applicants, that transfer of reserves to the PO is, by its very nature, existing aid, in that the reserves in question derive from the provision of public funds as part of the regular annual funding. They claim that the Commission did not establish that the reserves stem from ad hoc payments.

166 Moreover, the NOS alleges that the transfer of the reserves in question was approved at a meeting held on 28 June 2005 between its representatives and the Member of the Commission responsible for questions of competition.

167 The Kingdom of the Netherlands maintains, for its part, that the transfer of the programme reserves to the PO is a consequence of the appropriate measure proposed by the Commission under the existing aid procedure. In its view, it is therefore unacceptable that such a measure could give rise to a new aid measure which the Commission could later require to be recovered.

168 Thirdly, the NOS claims that the provision of technical facilities by the NOB to the public service broadcasters does not constitute State aid and that, in any event, it is not new. It alleges that the technical facilities are not provided free of charge.

169 The Commission points out, first of all, that the only question of interest in the present dispute is whether the payments from the FOR and the transfer of programme reserves to the PO constitute new aid. It then disputes the applicants' arguments seeking to substantiate the classification of the ad hoc payments as existing aid.

Findings of the Court

170 At the outset, the applicants' arguments claiming that the payments stemming from matching funds and from the CoBo Fund do not constitute new aid must be ruled to be ineffective. It is apparent from their forms of order (see paragraphs 18 and 20 above) and, in the case of the NOS, from the further information it provided in this regard at the hearing (see paragraph 66 above) that the applicants limited the subject-matter of their actions to the annulment of Article 1(1) and (2) of the contested decision. These arguments relating to the payments stemming from matching funds and from the CoBo Fund therefore have no effect on the outcome of the dispute, which relates only to the ad hoc payments received by the NOS in its role as the PO, the recovery of which is ordered, that is to say, the payments from the FOR and the transfer of the public service broadcasters' reserves (see Table 4 in recital 152, recitals 154, 178 and 179 and Article 1(2) of the contested decision). Reference should be made to paragraph 135 above with regard to the ineffective nature of the applicants' argument relating to the free technical facilities provided by the NOB.

171 As regards, first, the statement of reasons in the contested decision for the classification of the payments as new aid, in Section 2.3 the Commission described the public service broadcasters' various sources of funding, comprising annual payments and ad hoc payments, including those from the FOR. In Section 2.4 the Commission also detailed the reserves of the various broadcasters and reported, in recital 49, that in 2005

the PO had decided that the broadcasters would transfer part of their programme reserves to the PO but would be permitted to retain part of them. The Commission added that the public broadcasters had transferred EUR 42.457 million to the PO.

172 The classification of the ad hoc payments as new aid is the subject of Chapter 7 of the contested decision (recitals 106 to 111). In that chapter the Commission distinguishes between the annual payments made on the basis of Article 110 of the Mediawet, which constitute existing aid, and the ad hoc payments.

173 In recital 109 of the contested decision the Commission describes in detail five characteristics which distinguish the ad hoc payments from the regular annual payments and argue against their classification as existing aid:

— the legal base for the ad hoc payments was established after the entry into force of the EC Treaty; for those relevant to the present dispute, it was in 1998 that it became possible to make ad hoc payments from the FOR to the broadcasters;

— the payments were only made from 1994 onwards, and from 1999 onwards in the case of payments from the FOR;

— the ad hoc payments cannot be deemed to be payments to which the public service broadcasters are entitled, and their payment is not automatic;

— the conditions under which the transfers can take place are laid down in transfer protocols established in 1999 and 2002;

— the funding is granted for specific purposes, in particular to give an impetus to broadcasters to produce better programmes, to absorb fluctuations in advertising revenues, to match increased prices of sports rights and to stimulate co-productions with Belgian and German broadcasters.

174 Moreover, in its assessment of the compensation of the individual public service broadcasters (Section 8.4.1 of the contested decision), the Commission stated that 14 of them had been over-compensated in the period from 1994 to 2005 and that this had generated EUR 32 million in profits, which had generally been transferred to their programme reserves. In recital 146 of the contested decision the Commission repeated that the over-compensation had generally flowed into the programme reserves and added that in 2005 it had been decided for the first time that reserves held by the individual broadcasters in excess of 5 to 10 % of their annual budget should be transferred to the PO. It added that this transfer was also considered part of the ad hoc payments and that it had been taken into account in determining the proportionality of the compensation.

175 It must therefore be found that, contrary to the allegation of the NOS, the contested decision contains a detailed statement of the reasons for classifying the ad hoc payments as new aid, which, in accordance with the case-law, discloses in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the Court to exercise its power of review.

176 Secondly, with regard to the error of assessment allegedly committed by the Commission in classifying the ad hoc payments as new aid, it is clear from Article 1 of Regulation No 659/1999 that existing aid means all aid which existed prior to the entry into force of the EC Treaty in the respective Member States and all aid which has been authorised by the Commission or by the Council and that any alterations to existing aid must be deemed to be new aid.

177 According to that unequivocal provision, it is not 'altered existing aid' that must be regarded as new aid, but only the alteration as such that is liable to be classified as new aid. Accordingly, it is only where the alteration affects the actual substance of the original scheme that the latter is transformed into a new aid scheme. There can be no question of such a substantive alteration where the new element is clearly severable from the initial scheme (Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission* [2002] ECR II-2309, paragraphs 109 and 111).

178 Article 88(3) EC treats alterations to existing aid as new aid in order to prevent the Member States from circumventing the obligation to notify new aid by extending the scope of a scheme that is already in force in order to achieve the same result (see, to that effect, Joined Cases 91/83 and 127/83 *Heineken Brouwerijen* [1984] ECR 3435, paragraph 17).

179 In the present case, it is common ground that only the ad hoc payments, including the transfer of reserves to the PO in 2005, are classified as new aid in the contested decision (recitals 111 and 146). In recital 8 of the contested decision the Commission states that the annual payments and the Stimulation Fund (Stifo) are being assessed in a separate existing aid procedure. The initial system of existing aid is therefore not affected by the contested decision.

180 Whether aid may be classified as new aid or as alteration of existing aid must be determined by reference to the provisions providing for it (see, to that effect, *Namur-Les assurances du crédit*, cited in paragraph 162 above, paragraph 28).

181 It is precisely on the case-law resulting from *Namur-Les assurances du crédit*, cited in paragraph 162 above, that the NOS relies in order to allege that even if they may be valid, none of the characteristics adduced by the Commission in recital 109 of the contested decision (see paragraph 173 above) is decisive.

182 It is true that some characteristics of the ad hoc payments are similar in some respects to mechanisms that existed in the past or those of some annual payments. None the less, taken together the characteristics of the ad hoc payments establish that they are new aid severable from the scheme put in place in 1958. That precludes attaching them to existing aid, as the circumstances of the present case cannot be compared to those of the case that gave rise to the *Namur-Les assurances du crédit* judgment, cited in paragraph 162 above.

183 The applicants have produced no evidence that calls into question the Commission's claims that the legal base for the ad hoc payments was established after the entry into force of the EC Treaty and that the payments, which were not regular and automatic but granted for specific purposes, were made only from 1999 onwards as far as the present case is concerned.

184 As regards the FOR, although the applicants claim that these payments continue to come from the general media budget, they do not deny that the FOR was not established until 1997. Articles 106a and 170c of the Mediawet, which relate to the FOR, came into effect in 1998. Although a draft law provided for the creation of the FOR in 1953, the draft law was not adopted.

185 Furthermore, it must be found that the applicants' allegations that payments similar to those made on this basis had already been disbursed from the AOR for many years in no way establish that the Commission was wrong to claim, in the second indent of recital 109 of the contested decision, that in particular the payments from the FOR began in 1999 and, in recital 146 of the contested decision, that it was decided in 2005 to transfer part of the broadcasters' reserves to the PO subject to certain conditions.

186 As regards more specifically the transfer of excess reserves amounting to EUR 42.457 million to the PO, it is clear from the contested decision that the Commission deemed this to be new aid to the PO — decided for the first time in 2005 and based on Article 109a of the Mediawet, which requires the public service broadcasters whose reserves exceed a fixed maximum to pay the difference to the PO — and not an annual payment within the meaning of Articles 101 and 110 of the Mediawet.

187 It must be found that this transfer of the public service broadcasters' reserves actually occurred for the first time in 2005 as a result of the decision of the Netherlands authorities to permit each public service broadcaster to create a reserve amounting to a maximum of 5 to 10 % of its annual budget. That transfer was based on Article 109a of the Mediawet, which was introduced into this legislation after the Treaty came into force. That transfer is therefore not part of the annual financing under Articles 101 and 110 of the Mediawet governing existing aid. Moreover, it is clear from the annex to the Netherlands authorities' letter of 1 September 2005 that the need for such a transfer stemmed from the fact that the ordinary budget was insufficient to attain the programming objectives on the main platforms, so that this transfer also served specific purposes (see also paragraphs 182 and 183 above). Under Article 1 of Regulation No 659/1999 and the case-law cited in paragraphs 177 and 180 above, this transfer, which reduced the overall compensation of the individual public service broadcasters while increasing the over-compensation of the PO, must therefore be classified as new aid to the PO in addition to the existing aid that it already received. As the

present case shows, in the absence of such a classification it would be sufficient for a Member State to make such transfers to relieve itself at least in part of a well-founded obligation to repay aid.

188 Hence, inasmuch as the applicants do not contest the existence of State aid to the PO in this context, their arguments that the reserves of the public service broadcasters at the previous stage may have included an element of existing aid are ineffective (see also paragraph 239 below). Even supposing that this claim were proven, all the aid to the PO would none the less be new.

189 In any event, the applicants provide no precise evidence, whether figures or otherwise, to support their allegations that the reserves of the public service broadcasters included an element of existing aid.

190 The Commission stated, in recital 141 of the contested decision, that 14 public service broadcasters had been over-compensated, generating profits of EUR 32 million, which had generally been transferred to their programme reserves. The Commission alleges, without being contradicted by the applicants, that the over-compensation of each broadcaster was calculated using the same method as that described in the contested decision for the NOS in its role as the PO. It is apparent from the Commission's letter of 22 December 2005 to the Netherlands authorities, and in particular from the table attached as Annex I, that the Commission in fact asked them to provide information on the costs and revenues of each broadcaster over the period from 1994 to 2005, broken down according to the net costs of public service activities, ordinary annual payments, the surplus or possible deficit and, separately, the various ad hoc payments, in order finally to be able to calculate any over-compensation. As in the case of the PO, the Commission was therefore able to calculate, on the basis of the figures provided by the Netherlands authorities on 3 February 2006, the

over-compensation of the individual public service broadcasters on account of the ad hoc payments which flowed into their programme reserves. The applicants merely claim in very general terms – and while alleging the complete absence of new aid – that part of the amount covered by the recovery order consisted of sums paid in the form of existing aid, which is not sufficient to substantiate their argument.

191 In this regard, it must be added that whereas in recital 153 of the contested decision the Commission estimated that the over-compensation received by the PO from 1994 to 2005 amounted to EUR 98.365 million and considered it to be aid incompatible with the common market, in recital 154 of the contested decision it capped the recovery at EUR 76.327 million, corresponding to only the ad hoc payments, 'which were not received in the context of the existing aid measures'.

192 This is clearly not a calculation error, as the NOS claims. On the contrary, it meets the concern expressed by the NOS not to include the over-compensation resulting from existing aid in the amount to be recovered. The Commission's intention was precisely to limit the recovery to the new aid represented by the ad hoc payments, that is to say, the payments from the FOR and the transfer of EUR 42.457 million to the PO from the broadcasters' reserves in 2005. It is clear from Table 4 in recital 152 of the contested decision that the rounded amount of EUR 98.4 million comprises, in addition to EUR 76.3 million in ad hoc payments, over-compensation of EUR 20.7 million received by the PO, representing the difference between its annual payments and its public funding needs. That over-compensation is not covered by the recovery obligation established by the contested decision.

193 Moreover, the argument of the Kingdom of the Netherlands that the transfer of the public service broadcasters' reserves to the PO represents the implementation of a demand made by the Commission in the existing aid procedure must be rejected as unfounded.

194 First, the Kingdom of the Netherlands provides no proof in this regard.

195 Secondly, as mentioned above (see paragraph 187), it is clear from the annex to the Netherlands authorities' letter of 1 September 2005 to the Commission that the size of the transfer of those reserves was justified by the fact that the normal budget for education, culture and science was insufficient to attain the programming objectives on the main platforms. That reasoning has nothing to do with the procedure on existing aid.

196 Thirdly, the PO is not a State authority, so that the transfer of the reserves in question to the PO is not equivalent to a recovery of those sums by the State. Hence, the Commission rightly disputes in any event that the said transfer might constitute a response to its demand in the existing aid procedure. In that regard, even supposing it be proven, a possible positive reaction of the Member of the Commission responsible for questions of competition regarding a future transfer of the reserves at the discussion held with the NOS on 28 June 2005 — which according to the Commission was informal — may have related to a transfer of the reserves to the Netherlands State. The NOS fails to establish that the Commission approved such a transfer to the PO.

197 Moreover, although the Netherlands authorities were able to indicate that their objective was to transfer the excess reserves to the AOR, which is a State-owned reserve and part of the media budget, footnote 62 to recital 149 of the contested decision states that the Netherlands authorities undertook, in a letter dated 4 May 2006, to introduce this rule into the 2006 Finance Law in order to guarantee its application until the adoption of the 2007 Mediawet. The Kingdom of the Netherlands has produced no evidence to show that this rule was already applicable when the contested decision was adopted.

198 The second plea of the Kingdom of the Netherlands and the first plea of the NOS alleging the incorrect classification of the ad hoc payments as new aid must therefore be dismissed.

The incorrect application of Article 86(2) EC and the errors made in calculating the alleged over-compensation, and the absence of a statement of reasons in this regard

199 The third plea raised in the alternative by the Kingdom of the Netherlands is divided into three limbs. In the first limb the Kingdom of the Netherlands claims that the Commission wrongly concluded that there was over-compensation despite finding no actual distortion of competition. In the second limb it maintains that the Commission committed an error of assessment and failed in its obligation to state reasons by not investigating whether part of the aid declared to be incompatible with the common market, amounting to EUR 33.870 million, might actually over-compensate the PO. In the third limb it claims that the Commission should have applied to the amount transferred to the PO the same margin of tolerance of 10 % that it applied to the public service broadcasters.

200 In its third plea the NOS maintains in essence that the Commission wrongly concluded that there was a link between the ad hoc payments and the over-compensation which it ordered to be recovered. In its view, the Commission had also failed to provide an adequate statement of reasons for the contested decision in this regard and had misinterpreted Articles 86 EC to 88 EC. In its fifth plea the NOS alleges that the Commission wrongly applied Article 86(2) EC and did not sufficiently explain the reasons for the contested decision by not examining, in the context of proportionality, the relationship between the claimed over-compensation and the lack of distortion of competition.

201 It is necessary to examine, first, the breach of Article 86(2) EC in relation to the assessment of proportionality, secondly the absence of a link between the ad hoc payments and the alleged over-compensation and the costs to be taken into account in calculating the over-compensation, thirdly an error in taking into account the amounts from the FOR in calculating the over-compensation received by the PO, and fourthly a failure to take into account, when calculating the amount to be recovered in connection with the transfer of programme reserves, the margin of tolerance of 10% permitted by the Commission.

The breach of Article 86(2) EC in relation to the assessment of proportionality

— Arguments of the parties

202 The Kingdom of the Netherlands maintains, in essence, that the Commission breached Article 86(2) EC and Article 87(1) EC by concluding inconsistently that the principle of proportionality had not been observed whereas it had not identified any anti-competitive practices. In the applicant's view, the Commission was therefore wrong to order the recovery of the amounts referred to in the contested decision in the absence of any distortion of competition. The Kingdom of the Netherlands cites paragraph 58 of the Broadcasting Communication in this regard. Lastly, it states that it does not claim that the Commission should have produced specific proof of anti-competitive behaviour but that it observes that the Commission itself found that the measures under investigation had not led to anti-competitive behaviour.

203 The NOS, for its part, alleges first that the Commission wrongly applied Article 86(2) EC and did not sufficiently explain the reasons for the contested decision by not examining, when considering proportionality, the relationship between the claimed over-compensation and the lack of distortion of competition. The NOS refutes the Commission's assertion that this plea is identical to the third limb of its fourth plea. It states that whereas in the third limb of its fourth plea it relied on the absence of a distortion of competition, which is a necessary condition for classifying a measure as aid, it maintains in the present plea that the Commission should have examined the fact that there is no distortion of competition since the NOS is entrusted with a public service remit.

204 For one thing, according to the NOS, the Commission should have taken account of the fact that the delay in using the funds, in some periods, is justified by the smallness of the Dutch-speaking region.

205 In this regard, the NOS denies that for the period under consideration it received payments in excess of its net public service costs. It states that television productions that have been commissioned are frequently not available and delivered until the following year. Hence, the Commission's assertion that it takes this factor into consideration in the rule that the public service broadcasters may hold 10 % of their annual budget in reserve is unconvincing, because in the view of the NOS the Commission should have taken account of all the relevant circumstances of the case. Among those circumstances, the NOS maintains that the smallness of the Dutch-speaking region is often a serious constraint on finding good producers or actors quickly and leads to delays.

206 Moreover, the NOS alleges that the Commission should have taken into consideration the fact that the over-compensation would disappear in the near future. In particular, the reserves transferred by the public service broadcasters to the PO would, according to the NOS, have been completely used by 2006 or by 2007 at the latest.

207 Lastly, the NOS considers that the Commission's argument that it is required to adopt the contested decision on the basis of the evidence existing at that date is not valid, in that in the present case all the reserves built up by the individual broadcasters during 2006, with an overshoot in 2007, were allocated fully to the fulfilment of the public service remit.

208 Secondly, the NOS maintains that in recitals 116 to 121 of the contested decision the Commission breached Article 86(2) EC in that it is not for the Commission to determine the content of the public service remit or to check for manifest errors in the description of that remit in national legislation. In that regard, the NOS disputes the Commission's assessment in recital 121 of the contested decision that sports broadcasting must be limited to 10 % of total broadcasting time.

209 Thirdly, the NOS disputes the conclusion in Article 1(1) of the contested decision that the aid was incompatible with the common market despite the fact that the Commission did not examine whether this aid was justified under Article 87(2) and (3) EC, given the smallness of the Dutch-speaking region.

210 The Commission disputes the arguments put forward by the applicants.

— Findings of the Court

211 At the outset, it is necessary to refer to paragraphs 114 to 124 above, in so far as the applicants rely on the absence of distortion of competition for the purposes of Article 87 EC on the ground that the Commission concluded, upon completion of its examination of the compatibility of the aid under Article 86(2) EC (Chapter 8 of the contested decision) and more specifically of the proportionality of the aid, that no specific anti-competitive practices could be identified in the procedure in question. It is clear from those paragraphs that the Commission correctly established that there was a risk of distortion of competition for the purposes of classifying the ad hoc financing as State aid within the meaning of Article 87 EC and stated reasons for that conclusion. Moreover, the finding that there was a risk of distortion of competition for the purposes of classifying measures as State aid does not conflict with the fact that the Commission did not identify specific anti-competitive practices when examining the proportionality of the compensation (see paragraphs 121 to 124 above).

212 As regards the investigation of the existence of anti-competitive practices as part of the examination of the proportionality of the compensation, the Commission states, in recitals 124 to 126 of the contested decision, referring to the Broadcasting Communication, that this is the second part of the dual assessment of proportionality which it must carry out.

213 In this regard, recital 126 of the contested decision states the following:

'On the other hand, the Commission has to investigate any information at its disposal suggesting that public broadcasters have distorted competition in commercial markets more than is necessary for the fulfilment of the public service mission. For example, a public service broadcaster, in so far as lower revenues would be covered by the State aid, might be tempted to depress prices of advertising or of other non-public

service activities on the market, so as to reduce the revenue of competitors. Such a practice would require additional State funding to compensate for the revenues forgone from commercial activities and would therefore indicate the presence of over-compensation of public service obligations.'

214 After assessing proportionality in this specific framework on the basis of the first criterion, that is to say, the level of compensation received by comparison with the net cost of the public service remit and the finding of over-compensation of the PO (recital 154 of the contested decision), the Commission went on to examine the anti-competitive behaviour of the public service broadcasters (Section 8.5 of the contested decision) in relation to possible distortions identified in the initiating decision. The fields involved are cable transmission, the advertising market and football transmission rights. Upon completing its examination of these limited fields, the Commission concluded that no specific anti-competitive practices could be identified in the procedure in question and added that the issue of whether the system as such offers sufficient safeguards against the possibility of anti-competitive behaviour would be examined in procedure E-5/2005 on existing aid.

215 In the contested decision the Commission therefore provided in this regard a statement of reasons in accordance with the case-law (see paragraph 80 above).

216 In accordance with paragraphs 57 and 58 of the Broadcasting Communication, in carrying out the first test the Commission rightly started from the consideration that State funding was necessary for carrying out the public service broadcasters' public service tasks. In that context it examined whether the test of proportionality between the payments from the State and the net costs of the public service remit was satisfied.

In the context of the separate test based on the second criterion it then investigated the possibility of distortions of competition which were not necessary for the fulfilment of the public service broadcasters' public service remit.

217 However, the conclusions of this second separate test could not eliminate or call into question the Commission's findings from the different assessment of the first test. It remains a fact that the net costs of the PO's public service remit were over-compensated, as shown in Table 4 set out in recital 152 of the contested decision.

218 The applicants' complaints in this regard must therefore be dismissed.

219 As regards the argument of the NOS that the Dutch-speaking region is small, it must be found that it cannot call into question the Commission's finding that public funding was disproportionate in that it exceeded the net costs of the public service.

220 Nor does the argument that the aid was used in accordance with its objective, even if proven, eliminate the over-compensation that was identified. Even if authorised by the relevant minister, the ad hoc financing may be excessive by comparison with the costs of the public service remit and thus lead to distortion of competition with commercial broadcasters.

221 As regards the argument that the reserves in question might rapidly disappear in the future, contrary to the allegations of the NOS the Commission could not take this possibility into account in the contested decision. Indeed, it is settled case-law that

the legality of a decision concerning State aid is to be assessed in the light of the information available to the Commission when the decision was adopted (Case C-276/02 *Spain* v *Commission* [2004] ECR I-8091, paragraph 31, and Case T-354/99 *Kuwait Petroleum (Nederland)* v *Commission* [2006] ECR II-1475, paragraph 65).

222 In this regard, it is nevertheless appropriate to observe that in its defence statement the Commission does not preclude the possibility that the events that occurred in 2006 may play a role in the concertation carried out with the Kingdom of the Netherlands under Article 10 EC regarding the implementation of the contested decision.

223 As regards the Commission's lack of powers to check for possible manifest errors of assessment by a Member State in the definition of its public broadcasting service, it must be recalled that, as the Commission states in point 22 of its Communication of 20 September 2000 on services of general interest in Europe (COM(2000) 580 final), Member States have wide discretion to define what they regard as services of general economic interest. Hence, the definition of such services by a Member State can be questioned by the Commission only in the event of manifest error (see Case T-17/02 *Olsen* v *Commission* [2005] ECR II-2031, paragraph 216 and the case-law cited).

224 This principle is reiterated in paragraph 36 of the Broadcasting Communication. It is clear from that paragraph that, as regards the definition of the public service in the broadcasting sector, although it is true that it is not for the Commission to decide whether a programme is to be provided as a service of general economic interest, or

to question the nature or the quality of a certain product, it must, as guardian of the Treaty, be able to intervene in the event of manifest error.

225 The Commission therefore acted within its powers in the present case.

226 With regard to the Commission's alleged failure to examine the applicability of the exemptions for which Article 87(2) and (3) EC provide, it is sufficient to note that the NOS does not state that during the administrative procedure before the Commission it alleged that the ad hoc payments could enjoy such exemptions and that it does not dispute the Commission's assertion that in its letter of 30 April 2004 the Kingdom of the Netherlands admitted that the ad hoc payments constituted State aid and only stated that their compatibility with the common market stemmed from Article 86(2) EC. Moreover, it must be found that before the Court the NOS puts forward no argument to establish that the geographic size of the Dutch-speaking region could somehow have justified the Commission finding itself bound, given its duty to ensure due process, to examine of its own motion whether the ad hoc payments could be justified under Article 87(2) and (3) EC.

227 As none of the arguments put forward by the applicants is well founded, the first limb of the third plea of the Kingdom of the Netherlands and the fifth plea of the NOS alleging breach of Article 86(2) EC on the assessment of proportionality must be dismissed.

The absence of a link between the ad hoc payments and the alleged over-compensation and the costs to be taken into account in calculating the over-compensation

— Arguments of the parties

228 The NOS maintains, in essence, that the Commission wrongly concluded that there was a link between the ad hoc payments and the over-compensation that it orders to be recovered. It also claims that the Commission provided an inadequate statement of reasons for the contested decision in this regard and misinterpreted Articles 86 EC to 88 EC.

229 First, the NOS claims that the Commission did not establish the extent to which the ad hoc payments had contributed to the build-up of reserves that led to the over-compensation. In its view, it is entirely possible that the reserves were created from funding other than the ad hoc payments, in particular from existing aid. The NOS asserts that they would not lose this classification on account of their transfer to the PO, which could only distribute them again on the basis of Article 109a(1) of the Mediawet. Moreover, according to the NOS, the transfer of the programme reserves to the PO was not part of the ad hoc payments referred to in recitals 37 to 45 of the contested decision.

230 Secondly, the NOS disputes the Commission's assessment, set out in recital 129 et seq. of the contested decision, that the net revenues from activities other than those linked to the fulfilment of the public service remit should be taken into account when calculating the amount of reserves in that the rules established by Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (OJ 1980 L 195, p. 35) had not been observed. In that regard, according to the NOS, the Commission should have conducted

an additional examination of the public service broadcasters' accounts without taking account of revenues from their commercial activities.

231 First of all, according to the NOS, it would be wrong to consider that the various public service broadcasters used different methods to calculate the costs and benefits associated with their public service remit.

232 The NOS also alleges that the public service broadcasters' auditors ensure that costs are calculated precisely and the Commissariat voor der Media (Media Authority) ensures that the use of the credits is justified.

233 Moreover, the public service and commercial activities are the subject of separate accounting and different management systems, in accordance with the *Handboek Financiele Verantwoording* (Financial Reporting Manual) and the guidelines of the Commissariat voor der Media. The NOS maintains that the manual, which is repeated in Netherlands legislation, is binding on the public service broadcasters. It points out that the financial reports drawn up by each public service broadcaster indicate the accounting methods used to allocate costs to the various activities they perform.

234 Moreover, the NOS claims that the Commission's assessment in this regard breaches Article 87(1) EC in that revenues from commercial activities are not public resources.

235 In addition, the NOS states, in reply to the assertions of the Commission, that the late transposition of Directive 80/723 into law by the Kingdom of the Netherlands could not be blamed on the NOS, since directives are addressed to the Member States. In any event, the directive in question does not lay down a single accounting method. Even if Directive 80/723 had not been implemented correctly, it would still be for the Commission to conduct a detailed examination of the public service broadcasters' costs.

236 Lastly, the NOS claims that in the contested decision the Commission had wrongly 'amalgamated' the ad hoc payments with other payments in order to establish that there was over-compensation, whereas payments other than ad hoc payments are existing aid.

237 The Commission refutes the arguments of the NOS in this regard.

— Findings of the Court

238 As regards the first complaint of the NOS, raised in paragraph 229 above, it is clear from the contested decision (see, in particular, paragraphs 81 to 89 above) that, first, the ad hoc payments to the public service broadcasters led to over-compensation of those broadcasters which generally flowed into their reserves, secondly that the part of those reserves in excess of 10 % of their annual budget was transferred to the PO for the first time in 2005, and thirdly that this transfer therefore led in turn to over-compensation of the PO. Contrary to the allegations of the NOS, in the contested decision

the Commission therefore clearly established a link between the ad hoc payments to the public service broadcasters and the over-compensation of the PO on account of the transfer to the PO of these undertakings' reserves linked to these payments.

239 Moreover, although the NOS claims that the Commission did not establish that the public service broadcasters' reserves transferred to the PO had been created from ad hoc payments and not from regular annual payments, it has already been found in paragraph 188 above that such an argument must be dismissed as ineffective since the source of the reserves in question has no effect on the assessment that it is the very transfer of reserves from the public service broadcasters to the PO that constitutes for PO new aid in addition to existing aid. Hence, the reply to the question whether the public service broadcasters' reserves were created from amounts stemming from new aid or existing aid has no effect on the fact that the Commission established that the very transfer of the reserves constituted new aid for the PO.

240 Moreover, the Commission rightly established that the existing aid had already over-compensated the needs of the public service. The applicants have not adduced any evidence to invalidate that assessment. Consequently, the amounts placed in reserve necessarily constituted over-compensation. The subsequent transfer of these reserves did not change their nature. There is therefore indeed a link between the ad hoc financing mentioned and the over-compensation.

241 The first complaint of the NOS must therefore be dismissed.

242 As regards the second complaint of the NOS, which alleges in essence that the Commission committed an error by taking into account all the net revenues of the NOS from commercial activities in order to establish that there was over-compensation, it must be noted that in recitals 127 to 131 of the contested decision the Commission indicated that this choice stemmed in part from the fact that it is not possible, from the accounts of the public service broadcasters, to correctly allocate the costs of public service activities and those of commercial activities. That would be contrary to Directive 80/723, which is applicable in the present case and which the Kingdom of the Netherlands implemented by adopting, in 2001, a special decree obliging public broadcasters to keep separate accounts for all side activities and association activities. Moreover, the Commission noted in the contested decision that under the Mediawet all the public service broadcasters' profits, including those from commercial activities, had to be used for public service purposes.

243 Without assessing whether Directive 80/723 was incorrectly implemented, as alleged by the Commission, and the impact that might have, it must be stated that under Netherlands legislation the public service broadcasters must allocate all their revenues, including those from commercial activities, to fulfil public service tasks. The NOS acknowledges as much in its submissions when it states that by definition it would be impossible for the NOS itself or other broadcasters to use undisbursed sums for any other purpose. Consequently, these revenues had to be taken into account when investigating possible over-compensation.

244 Hence, the Commission committed no error when it took into account the net revenues of the actors in the Netherlands public broadcasting system from commercial activities in its calculation of the over-compensation of their public service remit.

245 In these circumstances, the arguments of the NOS alleging that its accounts complied with the relevant Netherlands legislation and had been audited, that the Media Authority ensured that allocated resources were properly employed and that Directive 80/723 had not been incorporated into law in the Kingdom of the Netherlands until 2001 must be dismissed as ineffective.

246 It must be noted, moreover, that at the hearing the applicants stated that they did not dispute the figures on the PO in Table 4 in recital 152 of the contested decision. They have produced no evidence to call into question the total of the net costs of public activities, the net profit from commercial activities, the needs for public funding and the annual payments, figures from which the Commission established, solely on the basis of the annual payments, that in the case of the PO there was over-compensation amounting to EUR 20.7 million, in addition to which it received ad hoc payments, the recovery of which is sought by the Commission.

247 It is therefore necessary likewise to reject the second complaint raised by the NOS as part of its third plea.

The taking into account of the amounts from the FOR in the calculation of the over-compensation of the PO, the recovery of which has been ordered, and a lack of a statement of reasons in this regard

— Arguments of the parties

248 The Kingdom of the Netherlands alleges, in essence, that the Commission committed a manifest error of assessment and failed in its duty to state reasons by considering that the transfer of EUR 33.870 million from the FOR to the PO formed part of the over-compensation, without investigating whether and how the PO had used this sum. According to the Kingdom of the Netherlands, if the Commission had carried out such an investigation it would have found that over the period from 1999 to 2005 the PO spent all the sums that it had received from the FOR, so that in 2005 the PO no longer had any funds from the FOR that could be recovered.

249 The Kingdom of the Netherlands states that, contrary to the claims of the Commission, at the date of the contested decision the Commission knew that the amount from the FOR was nil at the end of 2006, since in its letter of 3 February 2006 it had informed the Commission that the FOR only contained EUR 8.8 million at the end of 2005 and nothing at the end of 2006. Moreover, according to the applicant, the Commission could have continued its inquiry for six months in order to take account of all relevant information.

250 The NOS, for its part, argues that in the contested decision the Commission did not allege any negligence in the use of the payments amounting to EUR 33.8 million that the NOS received from the FOR, whereas these sums were spent on activities, in

particular investment in digital media, responsibility policy and the promotion of satellite and radio, and in accordance with the transfer protocols.

251 The Commission refutes the arguments put forward by the applicants.

— Findings of the Court

252 As regards the alleged lack of a statement of reasons, it must be pointed out that the payments from the FOR are described in Section 2.3.3 of the contested decision relating to the ad hoc payments and then assessed by the Commission under the State aid rules (see paragraphs 83 to 85 above).

253 Upon completion of that examination, the payments from the FOR were mentioned in the contested decision among the ad hoc payments that constituted State aid within the meaning of Article 87(1) EC (recital 105), and more specifically new aid (recital 111).

254 Finally, in the contested decision the payments from the FOR were taken into account when assessing the proportionality of public funding, and in particular in the calculation of the over-compensation enjoyed by the PO (see Table 4 in recital 152 and recital 154).

255 Hence, in the contested decision the Commission explained, in accordance with the case-law (see paragraph 80 above) its reasoning and conclusions regarding the payments from the FOR.

256 As regards the allocation of the payments from the FOR, since the Commission established in the contested decision that the compensation received by the PO was excessive in relation to its needs for public funding (see Table 4 in recital 152) on account of the ad hoc payments at issue, it cannot be required to investigate the use the PO made of that excess. Even if the payments from the FOR were used correctly, they would still contribute to the over-compensation received by the PO by comparison with its needs for public funding, the amount of which is not in dispute.

257 As regards the alleged complete utilisation of the payments from the FOR in 2006, according to settled case-law cited in paragraph 221 above, the legality of a decision concerning State aid is to be assessed in the light of the information available to the Commission when the decision was adopted. The contested decision covers the period from 1994 to 2005, the last year for which the Commission had final figures (recital 10). Hence, in any event, this justifies the fact that the Commission did not take figures from 2006 into account.

258 The second limb of the third plea raised by the Kingdom of the Netherlands and the argument put forward by the NOS in this regard in its third plea are therefore unfounded.

The failure, when calculating the amount to be recovered in connection with the transfer of programme reserves, to take into consideration the margin of tolerance of 10 % permitted by the Commission

— Arguments of the parties

259 The Kingdom of the Netherlands claims, in essence, that the Commission, in accordance with its decision-making practice and the Broadcasting Communication by which it is bound, should have applied a margin of tolerance of 10 % to the transfer of the excess programme reserves to the PO rather than taking into account the total amounts placed in reserve.

260 The Kingdom of the Netherlands states that it drew this issue to the Commission's attention in good time, namely in its letter of 1 September 2005. It points out that if the Netherlands legislature had permitted certain associations of public broadcasters to create reserves of up to 10 % rather than only 5 %, the amount transferred to the PO would have been lower.

261 In reply to the Commission's assertion that the Netherlands authorities knew that it permitted a margin of tolerance of 10 % of the amount of the reserves, the Kingdom of the Netherlands states that although Commission Decision 2005/217/EC of 19 May 2004 on measures implemented by Denmark for TV2/Danmark (OJ 2006 L 85, p. 1) recognises the principle that reserves may be retained and carried forward from one year to the next, it does not mention any precise percentage. Moreover, according to the Kingdom of the Netherlands, Decision 2005/842 was adopted after the transfer to the PO.

262 The Kingdom of the Netherlands also observes that the transfer of part of the reserves in excess of the margin of tolerance of 10% applied by the Commission was decided by the PO under Article 109a(1) of the Mediawet and not by the Netherlands authorities.

263 The Commission disputes the arguments of the Kingdom of the Netherlands.

— Findings of the Court

264 In so far as the Kingdom of the Netherlands complains that the Commission took account of the total amount of the transfer of reserves to the PO and did not observe the margin of tolerance of 10% which it allows on the level of broadcasters' reserves, it must be found that, as it recognises in its submissions and as is clear from the contested decision (see, in particular, recitals 49, 146 and 149), the Commission took account of the amount transferred by the public service broadcasters to the PO under Netherlands legislation. The Kingdom of the Netherlands therefore appears to complain that the Commission failed to apply a percentage of 10% that the PO itself did not use, despite both the PO and the Netherlands authorities being aware of this ceiling.

265 In any event and, therefore, regardless of the date on which Decision 2005/842 came into force, this transfer of reserves to the PO amounted to EUR 42.457 million, a sum that is not in dispute and which, according to the Commission, constitutes a corresponding part of the over-compensation of the PO. The Commission rightly analysed the over-compensation of the PO on the basis of the available data. It cannot be held against the Commission that it did not calculate the over-compensation of the PO by taking account of the fact that the over-compensation might have been lower

on the basis of the margin of tolerance of 10 % that it admits could have been applied to the public service broadcasters' reserves. The Commission was not obliged to take into account the margin of tolerance of 10 % of the reserves that the broadcasters might have been able to retain but did not, with the result that the over-compensation of the PO was higher.

266 In the alternative, it must be pointed out that it is clear from recitals 147 to 149 of the contested decision that the principle of permitting a certain percentage of the annual over-compensation to be carried forward to the next year, as recognised by the Commission, is applied, subject to specific conditions, within the budget of each public service broadcaster from one year to the next in order to allow for fluctuations in the costs of public broadcasting. It would be contrary to its purpose to regard this tolerance as a general rule to be applied when the said reserves of the public service broadcasters are transferred to another body. As is clear from recital 113 of Decision 2005/217 and as confirmed by Decision 2005/842, the purpose of this rule is not to release the Member State permanently from its repayment obligation. Under the second paragraph of Article 6 of the latter decision, where it does not exceed 10 % of the amount of the annual compensation, the over-compensation may be carried forward to the next annual period and deducted from the amount of compensation payable in respect of that period. In addition, in its application the Kingdom of the Netherlands argues that up to this limit of 10 % the reserves may be retained and carried forward to the next year. That does not correspond to the present case, since the sum in question was not carried forward but transferred to another body.

267 As the third limb of the third plea raised by the Kingdom of the Netherlands is therefore unfounded, it must be dismissed.

268 As none of the pleas raised by the applicants is well founded, the action of the Kingdom of the Netherlands in Case T-231/06 and the action of the NOS in Case T-237/06 must be dismissed in their entirety.

Costs

269 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful and the Commission has applied for costs, the applicants must be ordered to pay the costs.

On those grounds,

THE GENERAL COURT (First Chamber, Extended Composition)

hereby:

1. Dismisses the actions;

2. In Case T-231/06, orders the Kingdom of the Netherlands to pay the costs;

3. In Case T-237/06, orders the Nederlandse Omroep Stichting (NOS) to pay the costs.

Dehousse Wiszniewska-Białecka Jürimäe

Dittrich Soldevila Fragoso

Delivered in open court in Luxembourg on 16 December 2010.

[Signatures]

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