

Appeal brought on 5 February 2016 by Comunidad Autónoma de Galicia and Redes de Telecomunicación Galegas Retegal, S.A. (Retegal) against the judgment of the General Court (Fifth Chamber) delivered on 26 November 2015 in Joined Cases T-463/13 and T-464/13 Comunidad Autónoma de Galicia and Retegal v Commission

(Case C-70/16 P)

(2016/C 118/21)

Language of the case: Spanish

Parties

Appellants: Comunidad Autónoma de Galicia and Redes de Telecomunicación Galegas Retegal, S.A. (Retegal) (represented by: F. J. García Martínez and B. Pérez Conde, abogados)

Other parties to the proceedings: European Commission and SES Astra

Form of order sought

The appellants claim that the Court should:

- declare admissible and well-founded the grounds relied on in the appeal;
- set aside the judgment of the General Court of the European Union of 26 November 2015, delivered in joined cases T-463/13 and T-464/13;
- give a definitive ruling on the action for annulment, by upholding the claims made by the applicant at first instance against the contested Commission Decision ⁽¹⁾ of 19 June 2013 on State aid SA.28599 (C 23/10 (ex NN 36/10, ex CP 163/09)) implemented by the Kingdom of Spain for the deployment of digital terrestrial television in remote and less urbanised areas (outside Castilla-La Mancha);
- order the Commission to pay the costs in the present proceedings.

Grounds of appeal and main arguments

First ground of appeal: Error of law consisting in the lack of consistency of the operative part of the judgment under appeal in view of the finding of errors in the contested decision, pointed out in the fourth plea in law of the application, in that it expressly characterised Retegal as the direct beneficiary of unlawful State aid and quantified the amount to be recovered

By this ground of appeal, the appellants emphasise the clear inconsistency in the judgment under appeal, the operative part of which did not reflect the errors found in the contested decision (recitals 193 and 194 of the decision) relating to the specific situation of Galicia, consisting in the express characterisation of Retegal as the direct beneficiary of an unlawful State aid and the quantification of the amount to be recovered. Although the judgment under appeal (in paragraph 153) annuls the legally binding nature of that erroneous characterisation in the contested decision of Retegal as a direct beneficiary of the aid (in recital 193) and the erroneous quantification of the amount (in recital 194) to be recovered (in the operative part), a finding which the applicants support, the General Court does not repeat that express finding in the operative part, whereas the action sought the annulment of those erroneous determinations in the contested decision, which were correctly and specifically declared legally non-binding. Accordingly, for the purpose of internal consistency between the grounds of the judgment and the operative part, it is necessary to partially uphold the action, for logical reasons of legal certainty (in order to avoid subsequent conflicts concerning the interpretation of the scope of the contested decision at the recovery stage, as in the present case).

Second ground of appeal: Error of law relating to the infringement of Article 107(1) TFEU, in that the judgment under appeal found that the requirements for the qualification of the activity in question as State aid were met

By this ground of appeal, the parties seek the annulment of the judgment under appeal on the ground that the General Court erred in law by carrying out a review which did not comply with the criteria established by the case-law when verifying whether all the requirements for characterising the action of the Galician public authorities at issue as aid for the purpose of Article 107(1) TFEU were met. Despite the fact that the Commission acknowledged in the course of the proceedings that it did not have sufficient, reliable and comprehensive information in respect of the specific situation of Galicia, thus confirming the error of assessment criticised by the applicant at first instance, the judgment under appeal erroneously considered that the action of the Galician public authorities was not linked to the exercise of public power (public action necessary in view of the market failure in Zone II, in order to ensure that citizens could continue to receive the television signal after the abandonment of analogue television) but rather had an economic character. The General Court arrived at that conclusion because it failed to verify the substantive accuracy of the circumstances relied on by the Commission, in particular as regards the fact that the digital network of the municipal councils was not capable of commercial use, which is still the case. The General Court also committed an error when it confirmed the Commission's presumption that it was possible to 'provide other services' distinct from the 'DTT support services' via the support infrastructure belonging to the municipal council, despite the fact that such commercial use is substantively and legally impossible.

If a full review had been carried out of the specific elements of the case, in the manner required by the case-law invoked, the General Court would not have arrived at such a conclusion, since the infrastructure digitalised by the actions of the Galician public authorities in question could not be commercially exploited, as a result of its technical characteristics (a pylon and a hut), the level of equipment (TNT equipment only), and the applicable legal scheme (national legislation which only allows the national authorities to provide the service of transmitting the digital terrestrial television signal without remuneration), with the result that it cannot be considered that the measure falls within the scope of Article 107(1) TFEU.

Third ground of appeal: Error of law consisting in the breach of the obligation to state reasons (Article 36 of the Statute of the Court of Justice of the European Union and Article 81 of the Rules of Procedure of the General Court) and of Article 107(1) TFEU in that the General Court erred in its assessment of the selective character of the aid

By this ground of appeal, the appellants submit that the judgment under appeal (paragraph 85) is vitiated, as regards the selective character attributed to the measure in question, by the same failure to state reasons and error of assessment as the contested decision (recital 113), in that, without analysing or dealing with the failure to state reasons and the error of assessment alleged in the application, the General Court merely confirmed — without expressing clearly and unambiguously its reasoning — the Commission's position on that issue, thus not only failing to fulfil the duty to state reasons for judgments, but also failing to carry out the analysis of comparability necessary in order to be able to assess whether or not the aid has a selective character. If the General Court had not failed to carry out that obligatory analysis, it would have found that the situation of the municipal councils in Zone II in Galicia and that of other 'undertakings using other technologies', such as the intervener, are in no way comparable from a factual or legal point of view, since those other 'undertakings' neither provide nor are obliged to provide (under the conditions laid down in the national legislation: 'without remuneration') the service of transmitting the digital terrestrial television signal to citizens residing in Zone II in Galicia.

Fourth ground of appeal: error of law in the interpretation of Articles 14 and 106(2) TFEU and Protocol (No 26) on Services of General Interest and the case-law interpreting them

This ground of appeal is divided into three complaints, alleging an infringement of Articles 14 and 106(2) TFEU and Protocol (No 26) and the case-law interpreting them, in that the General Court in its judgment incorrectly interpreted those provisions of the TFEU referring to the SGEI. By the first complaint, the appellants submit that the judgment under appeal disregarded the Member States' margin of discretion to define a SGEI, by carrying out an interpretation, applied to the present case, which ignores and renders meaningless that discretion. The official document empowering the public action in question contains a clear and precise definition of the public service mission, and meets all the requirements laid down by the case-law to be regarded as a valid SGEI. By the second complaint, the appellants submit that the General Court did not examine whether there was a manifest error in the definition of the public service and did not find that the definition given by the public authorities was manifestly erroneous, despite having found that the activity in question was clearly an activity that could be qualified as a SGEI from a substantive point of view. By the third complaint, the appellants submit that the General Court committed errors of law in the judgment under appeal by carrying out an erroneous interpretation of the national legislation as a result of which it did not consider that there was a clear and precise definition of the SGEI as required by the judgment in *Altmark*.⁽²⁾

⁽¹⁾ Commission Decision of 19 June 2013 on State aid SA.28599 (C 23/10 (ex NN 36/10, ex CP 163/09)) implemented by the Kingdom of Spain for the deployment of digital terrestrial television in remote and less urbanised areas (outside Castilla-La Mancha) (OJ L 217, p. 52).

⁽²⁾ EU:C:2003:415

Appeal brought on 12 February 2016 by the Kingdom of Spain against the judgment of the General Court (Fifth Chamber) delivered on 26 November 2015 in Case T-461/13 Spain v Commission

(Case C-81/16 P)

(2016/C 118/22)

Language of the case: Spanish

Parties

Appellant: Kingdom of Spain (represented by: A. Rubio González, acting as Agent)

Other party to the proceedings: European Commission

Form of order sought

- Grant the appeal and set aside the judgment of the General Court of 26 November 2015 in Case T-461/13 *Spain v Commission*;
- Annul Commission Decision 2014/489/UE⁽¹⁾ of 19 June 2013 on State aid SA.28599 (C 23/10) (ex NN 36/10, ex CP 163/09) implemented by the Kingdom of Spain for the deployment of digital terrestrial television in remote and less urbanised areas (outside Castilla-La Mancha);
- Order the defendant to pay the costs.

Pleas in law and main arguments

Error of law relating to the control of Member States regarding the definition and application of a service of general economic interest. As regards the first condition laid down in the judgment in *Altmark*,⁽²⁾ the General Court refused to check whether or not the Commission had examined all the relevant factors in assessing the definition of a public service. Likewise, the General Court failed to check whether or not the Commission had examined all the relevant elements in order to assess whether the fourth condition laid down in the judgment in *Altmark* had been fulfilled. Accordingly, the General Court infringed the discretion allowing a Member State to organise its public service.