Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

26 November 2015*

(State aid — Digital television — Aid for the deployment of digital terrestrial television in remote and less urbanised areas in Spain — Decision declaring the aid compatible in part and incompatible in part with the internal market — Concept of an 'undertaking' — Economic activity — Advantage — Service of general economic interest — Distortion of competition — Article 107(3)(c) TFEU — Duty of diligence — Reasonable time — Legal certainty — Equal treatment — Proportionality — Subsidiarity — Right to receive information)

In Case T-461/13,

Kingdom of Spain, represented by A. Rubio González, Abogado del Estado,

applicant,

v

European Commission, represented by É. Gippini Fournier, B. Stromsky and P. Němečková, acting as Agents,

defendant,

APPLICATION for annulment of Commission Decision 2014/489/EU of 19 June 2013 on State aid SA.28599 ((C 23/2010) (ex NN 36/2010, ex CP 163/2009)) implemented by the Kingdom of Spain for the deployment of digital terrestrial television in remote and less urbanised areas (outside Castilla-La Mancha) (OJ 2014 L 217, p. 52),

THE GENERAL COURT (Fifth Chamber),

composed of A. Dittrich (Rapporteur), President, J. Schwarcz and V. Tomljenović, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 11 March 2015,

gives the following

* Language of the case: Spanish.

Judgment

Background to the dispute

1 The present case concerns certain measures implemented by the Spanish authorities in relation to the switch-over from analogue broadcasting to digital broadcasting throughout Spain, apart from the autonomous community of Castilla-La Mancha (Spain). That digitisation, which may technically be implemented via terrestrial, satellite and cable platforms or via high-speed Internet access, allows more effective use of the radio frequency spectrum. In digital broadcasting, the television signal is more resistant to interference and may be accompanied by a range of complementary services which provide added value to programming. In addition, the digitisation process makes it possible to obtain 'digital dividend', that is to say, freed-up frequencies, since digital television technologies take up a much narrower spectrum than analogue technologies. It was because of those advantages that the European Commission encouraged digitisation in the European Union from 2002.

2 The Kingdom of Spain established the regulatory framework necessary to promote the transition from analogue to digital broadcasting, by promulgating, in particular, Ley 10/2005 de Medidas Urgentes para el Impulso de la Televisión Digital Terrestre, de Liberalización de la Televisión por Cable y de Fomento del Pluralismo (Law No 10/2005 on urgent measures for the promotion of digital terrestrial television, liberalisation of Cable TV and support of pluralism) of 14 June 2005 (BOE No 142 of 15 June 2005, p. 20562, 'Law 10/2005') and Real Decreto 944 /2005 por el que se aprueba el Plan técnico nacional de la televisión digital terrestre (Royal Decree 944/2005 approving the National Technical Plan for digital terrestrial television) of 29 July 2005 (BOE No 181 of 30 July 2005, p. 27006, 'Royal Decree 944/2005'). Under that royal decree national broadcasters were required to cover 96% of the population in the case of the private sector and 98% of the population in the case of the public sector in their respective territories.

3 In order to manage the switch-over from analogue television to digital television, the Spanish authorities divided the Spanish territory into three separate areas:

— in Area I, which includes 96% of the Spanish population and was considered to be commercially profitable, the cost of switching to digital was borne by the public and private broadcasters;

— in Area II, which includes remote and less urbanised regions representing 2.5% of the Spanish population, the broadcasters, in the absence of commercial interest, did not invest in digitisation, which led the Spanish authorities to put public funding in place;

— in Area III, encompassing 1.5% of the Spanish population, digital terrestrial broadcasting was ruled out by the topography and the choice was therefore the satellite platform.

4 By decision of 7 September 2007, the Spanish Council of Ministers adopted the National Plan for the Transition to Digital Terrestrial Television ('DTT') implementing the national technical plan provided for in Royal Decree 944/2005. That plan divided the Spanish territory into 90 technical transition projects and established a deadline for the switch-off of analogue broadcasting for each of those projects. The objective set in that plan was to achieve coverage of the Spanish population by DTT comparable with the coverage of that population by analogue television in 2007, that is to say, more than 98% of that population.

5 Since the coverage obligations laid down for DTT (see paragraph 2 above) were likely to lead to a lower coverage of the Spanish population than had been achieved by the pre-existing analogue broadcasting, it was necessary to ensure television coverage in Area II. The present case concerns only the public funding granted by the Spanish authorities to maintain the terrestrial digitisation process in that area.

6 On 29 February 2008, the Spanish Ministry of Industry, Tourism and Trade ('the MITT') adopted a decision aimed at improving the telecommunications infrastructures and establishing the criteria and the distribution of the funding of the actions aimed at developing the Information Society under a plan called the 'Plan Avanza'. The budget approved under that decision was allocated in part to the digitisation of television in Area II.

7 Between July and November 2008, digitisation in Area II was implemented through a series of addenda to the 2006 framework agreements signed by the MITT and the Autonomous Communities of the Kingdom of Spain in the context of the Plan Avanza. As a result of those addenda, the MITT transferred funds to the Autonomous Communities, which undertook to cover the remaining costs of the operation from their own budgets.

8 On 17 October 2008, the Spanish Council of Ministers decided to allocate additional funding in order to extend and complete DTT coverage within the switch-over projects scheduled to be completed during the first half of 2009. The funding was granted following the signing of new framework agreements between the MITT and the Autonomous Communities in December 2008 relating to the implementation of the national plan for the transition to DTT. On 29 May 2009, the Council of Ministers approved the criteria for the distribution of the funds allocated for the funding of the DTT switch-over actions.

9 Following the signing of the addenda to the 2008 framework agreements on the extension of DTT coverage and the publication of those framework agreements and addenda in the *Boletín oficial del Estado*, the Autonomous Communities began to implement the extension process. In order to do so, they either organised open calls for tenders themselves or entrusted a public undertaking with the organisation of such calls for tenders. In some cases, the Autonomous Communities asked the municipal authorities to implement the extension.

10 As a general rule, two types of calls for tenders were launched in Spain. First, there were calls for tenders for the extension of coverage, which meant that the winning tenderer was charged with the mission of providing an operating DTT network. The tasks to be carried out included the design and engineering of the network, transport of the signal, deployment of the network and supply of the necessary equipment. The other calls for tenders related to the supply of telecommunications equipment.

11 In total, between 2008 and 2009 almost EUR 163 million from the central budget, partly soft loans granted by the MITT to Autonomous Communities, and around EUR 60 million from the budgets of the 16 Autonomous Communities concerned were invested in the extension of coverage in Area II. In addition, the municipal authorities provided funding of around EUR 3.5 million.

12 Beginning in 2009, the second stage after the extension of DTT to Area II consisted, for some Autonomous Communities, in organising other calls for tenders or in concluding contracts without calls for tenders for the operation and maintenance of the equipment digitised and deployed during the extension. The total amount of funds allocated through calls for tenders for operation and maintenance in the years 2009 to 2011 came to at least EUR 32.7 million.

13 On 18 May 2009 the Commission received a complaint from a European satellite operator, SES Astra, concerning an alleged State aid scheme which the Spanish authorities had implemented in relation to the switch-over from analogue television to digital television in Area II. That operator claimed that the scheme constituted non-notified aid that resulted in the distortion of competition between the terrestrial and satellite broadcasting platforms.

14 By letter of 29 September 2010 the Commission informed the Kingdom of Spain that it had decided to initiate the procedure laid down in Article 108(2) TFEU in respect of the aid in question for the whole territory of Spain, with the exception of the Autonomous Community of Castilla-La Mancha, for which

a separate procedure was opened ('the decision to initiate the procedure'). By publication of the decision to initiate the procedure in the *Official Journal of the European Union* on 14 December 2010 (OJ 2010 C 337, p. 17), the Commission invited the interested parties to submit their observations.

15 After receiving observations from the Spanish Authorities and other interested parties, the Commission on 19 June 2013 adopted Decision 2014/489/EU on State aid SA.28599 ((C 23/2010) (ex NN 36/2010, ex CP 163/2009)) implemented by the Kingdom of Spain for the deployment of digital terrestrial television in remote and less urbanised areas (outside Castilla-La Mancha) (OJ 2014 L 217, p. 52; 'the contested decision'), the operative part of which provides as follows:

'*Article 1*

The state aid granted to the operators of the terrestrial television platform for the deployment, maintenance and operation of the digital terrestrial television network in Area II unlawfully put into effect by [the Kingdom of] Spain in breach of Article 108(3) TFEU is incompatible with the internal market, except for the aid which was granted in compliance with the principle of technological neutrality.

Article 2

The individual aid granted under the scheme referred to in Article 1 does not constitute aid if, at the time it is granted, it fulfils the conditions laid down by a regulation adopted pursuant to Article 2 of Council Regulation (EC) No 994/98 applicable at the time the aid is granted.

Article 3

1. [The Kingdom of] Spain shall recover the incompatible aid granted under the scheme referred to in Article 1 from the Digital Terrestrial Television operators, whether they received the aid directly or indirectly.

2. The sums to be recovered shall bear interest from the date on which they were made available to the beneficiaries until their recovery.

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004.

4. [The Kingdom of] Spain shall cancel all outstanding payments of aid under the scheme referred to in Article 1 with effect from the date of adoption of this decision.

Article 4

1. Recovery of the aid granted under the scheme referred to in Article 1 shall be immediate and effective.

2. [The Kingdom of] Spain shall ensure that this Decision is implemented within four months following the date of notification thereof.

3. Within two months following notification of this Decision, [the Kingdom of] Spain shall submit the following information to the Commission:

(a) the list of beneficiaries that have received aid under the scheme referred to in Article 1 and the total amount of aid received by each of them under that scheme, broken down by the categories indicated in section 6.2 above;

(b) the total amount (principal and recovery interest) to be recovered from each beneficiary;

…

Article 5

This Decision is addressed to the Kingdom of Spain.'

16 In stating the grounds of the contested decision, in the first place, the Commission considered that the various acts adopted at central level and the agreements which had been concluded and amended between the MITT and the Autonomous Communities constituted the basis of the aid scheme for the extension of DTT in Area II. In practice, the Autonomous Communities applied the Spanish Government's guidelines on the extension of DTT (recital 91 of the contested decision).

17 In the second place, the Commission found that the measure at issue must be regarded as State aid within the meaning of Article 107(1) TFEU. Since the measure was financed from the State budget and the budgets of certain Autonomous Communities and municipal authorities, it constituted intervention through State resources. According to the Commission, the extension of the television broadcasting networks was an economic activity and did not entail the exercise of public prerogatives. The DTT operators are the direct beneficiaries of the aid, while the network operators who participated in the calls for tenders for the extension of cover are indirect beneficiaries of the aid. The advantage of that measure for the network operators is selective, since such a measure benefits only the broadcasting sector and, in that sector, the measure applies only to undertakings active in the terrestrial platform market. According to the contested decision, the Spanish authorities put forward, as the best and sole example, the case of the Autonomous Community of the Basque Country (Spain) to support their claim that the measure did not constitute State aid according to the criteria laid down by the Court of Justice in the judgment of 24 July 2003 in *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, ECR, EU:C:2003:415). However, the first criterion laid down in that judgment, according to which the recipient undertaking must actually have a public service mandate and the tasks and related obligations must be clearly defined, was not satisfied, in the Commission's view. In addition, the failure to ensure the least costs to that Autonomous Community meant that the fourth criterion laid down in that judgment was not satisfied. According to the Commission, since the satellite and terrestrial broadcasting platforms were in competition with each other, the measure, for the deployment, operation and maintenance of DTT in Area II, distorted competition between the two platforms. The measure in question also had an impact on intra-EU trade (recitals 94 to 141 of the contested decision).

18 In the third place, the Commission found that the measure at issue could not be regarded as State aid compatible with the internal market, pursuant to Article 107(3)(c) TFEU, notwithstanding that the measure was intended to achieve a well-defined objective in the public interest and that it had recognised the existence of a market failure. According to the Commission, since the measure did not respect the principle of technological neutrality, it was not proportionate and was not an appropriate instrument for ensuring the coverage of free-to-air channels to the residents of Area II (recitals 148 to 171 of the contested decision).

19 In the fourth place, the Commission considered that, as the operation of a terrestrial platform had not been clearly defined as a public service, the measure at issue could not be justified under Article 106(2) TFEU (recital 172 of the contested decision).

20 In the fifth place, the Commission observed that the measure at issue was not existing aid, because it should be regarded as an alteration affecting the actual substance of the original scheme. The Spanish authorities ought therefore to have notified the measure (recitals 173 to 175 of the contested decision).

21 In the sixth place, the Commission specified the different cases in which the Spanish authorities should recover the aid from the direct and indirect beneficiaries (recitals 179 to 197 of the contested decision).

Procedure and forms of order sought

22 By application lodged at the Court Registry on 30 August 2013, the Kingdom of Spain brought the present action.

23 By separate document, lodged at the Court Registry on the same date, the Kingdom of Spain submitted an application for interim relief, in which it claimed, in essence, that the President of the Court should stay the implementation of the contested decision. By order of 16 October 2013 in *Spain* v *Commission* (T-461/13 R, EU:T:2013:545), that application was dismissed and costs were reserved.

24 By document lodged at the Court Registry on 29 November 2013, the Asociación española de televisiones digitales privadas, autonómicas y locales (Asodal) sought leave to intervene in support of the form of order sought by the Kingdom of Spain. That application was dismissed by order of 24 February 2014 in *Spain* v *Commission* (T-461/13, EU:T:2014:109).

25 On hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure.

26 In the context of the measures of organisation of procedure provided for in Article 64 of its Rules of Procedure of 2 May 1991, the Court requested the Commission to produce certain documents. The Commission complied with that request within the prescribed period.

27 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 11 March 2015.

28 The Kingdom of Spain claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

29 The Commission contends that the Court should:

— dismiss the action;

— order the Kingdom of Spain to pay the costs.

Law

30 In support of its action, the Kingdom of Spain puts forward five pleas in law. The first plea alleges infringement of Article 107(1) TFEU, in that the Commission wrongly found the existence of State aid. The second plea, which is raised in the alternative, relates to the compatibility of the alleged aid at issue with the internal market. This plea alleges failure to observe the authorisation conditions referred to in Article 106(2) TFEU and Article 107(3)(c) TFEU. By the third plea, Kingdom of Spain claims that there has been a breach of the procedural rules. The fourth plea, raised in the alternative, relates to the demand for recovery of the aid and alleges a breach of the principles of legal certainty, equal treatment, proportionality and subsidiarity. By the fifth plea, the Kingdom of Spain claims, in the alternative, that there has been a breach of the fundamental right to receive information.

First plea, alleging infringement of Article 107(1) TFEU

31 The Kingdom of Spain takes issue with the Commission for having infringed Article 107(1) TFEU in that it found that there was State aid. In the applicant's submission, first, the entities concerned did not carry out any economic activity; second, the measure at issue was not selective, but was a service of general economic interest ('SGEI'); and, third, the measure in question did not distort competition.

First part, alleging that there was no economic activity

32 The Kingdom of Spain claims that the operation of the DTT network in Area II by the Autonomous Communities, public undertakings and municipal authorities corresponded to the exercise of public powers and was not an economic activity. Their sole interest was to respond to the needs of the rural population and not to participate in the market. They cannot therefore be classified as undertakings for the purposes of Article 107(1) TFEU.

33 It should be borne in mind *in limine* that for a measure to be classified as aid within the meaning of Article 107(1) TFEU, all the conditions set out in that provision must be fulfilled. First, there must be an intervention by the State or through State resources. Second, that intervention must be likely to affect trade between Member States. Third, it must confer an advantage on the recipient by favouring certain undertakings or the production of certain goods. Fourth, it must distort or threaten to distort competition (see judgment of 17 December 2008 in *Ryanair* v *Commission*, T-196/04, ECR, EU:T:2008:585, paragraph 36 and the case-law cited).

34 The present part of the plea concerns, more particularly, the third of those conditions, according to which measures, whatever their form, are likely directly or indirectly to favour certain undertakings or are to be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions, are regarded as State aid (see judgment of 2 September 2010 in *Commission* v *Deutsche Post*, C-399/08 P, ECR, EU:C:2010:481, paragraph 40 and the case-law cited).

35 It has consistently been held that, in the field of competition law, the concept of 'undertaking' covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. Any activity consisting in offering goods or services on a given market is an economic activity (see judgment of 10 January 2006 in *Cassa di Risparmio di Firenze and Others*, C-222/04, ECR, EU:C:2006:8, paragraphs 107 and 108 and the case-law cited). Whether or not an activity is economic in nature does not depend on the private or public status of the entity engaged in it or the profitability of that activity (see judgment of 19 December 2012 in *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle* v *Commission*, C-288/11 P, ECR, EU:C:2012:821, paragraph 50 and the case-law cited).

36 According to the case-law, activities which entail the exercise of public powers are not economic in nature, justifying the application of the competition rules of the FEU Treaty (see, to that effect, judgments of 19 January 1994 in *SAT Fluggesellschaft*, C-364/92, ECR, EU:C:1994:7, paragraphs 30 and 31, and of 16 December 2010 in *Netherlands and NOS* v *Commission*, T-231/06 and T-237/06, ECR, EU:T:2010:525, paragraph 93).

37 As regards the possible effect of the exercise of public powers on the classification of a legal person as an undertaking for the purposes of EU competition law, it must be noted that the fact that, for the exercise of part of its activities, an entity is vested with public powers does not, in itself, prevent it from being classified as an undertaking for the purposes of EU competition law in respect of the remainder of its economic activities. The classification as an activity falling within the exercise of public powers or as an economic activity must be carried out separately for each activity exercised by a given entity (see, to that effect, judgment of 1 July 2008 in *MOTOE*, C-49/07, ECR, EU:C:2008:376, paragraph 25 and the case-law cited).

38 It is therefore necessary to examine whether the activity at issue fell within the exercise of public powers, as the Kingdom of Spain claims, or within the exercise of an economic activity.

39 As a preliminary point, as regards the definition of the activity at issue, it should be observed that, according to Article 1 of the contested decision, the activity at issue consisted in the deployment, maintenance and operation of the DTT network in Area II by the Autonomous Communities, public undertakings and municipal authorities. In so far as the Kingdom of Spain emphasizes the fact that their only interest was to respond to the needs of the local population since it was necessary to ensure television coverage in that area, it should be observed that, in State aid matters, the objective pursued by State measures is not sufficient to exclude those measures from classification as 'aid' for the purposes of Article 107 TFEU. That article does not distinguish between the causes or the objectives of State interventions, but defines them in relation to their effects (see judgment of 22 December 2008 in *British Aggregates* v *Commission*, C-487/06 P, ECR, EU:C:2008:757, paragraphs 84 and 85 and the case-law cited). The Commission therefore did not err in relation to the definition of the activity at issue.

40 In order to settle the question whether the activity at issue, as defined in the contested decision, fell within the exercise of public powers or the exercise of economic activities, it is necessary to ascertain whether that activity is connected, by its nature, its aim and the rules to which it is subject, with the exercise of public powers or whether it is of an economic nature justifying the application of the EU competition rules (see judgments of 18 March 1997 in *Diego Calì & Figli*, C-343/95, ECR, EU:C:1997:160, paragraphs 16, 18 and 23 and the case-law cited, and of 28 February 2013 in *Ordem dos Técnicos Oficiais de Contas*, C-1/12, ECR, EU:C:2013:127, paragraph 40 and the case-law cited).

41 In recitals 97 to 99 of the contested decision, the Commission stated that the activity at issue was an economic activity on the same basis as other cases involving the management of infrastructures by the regional authorities. In its view, the market existed if, as in this case, other operators were willing or able to provide the service in question. It considered that the operation of the DTT network did not fall within State prerogatives and that it was not an activity that only the State could perform. The services concerned are not those generally performed by a public authority and are economic in nature, as shown by the fact that several undertakings are active on the market in Area I. In addition, the Commission considered that a European satellite operator was interested in providing those services in Area II in the context of a call for tenders and that the activity in question concerned only the transmission of national and regional private channels.

42 In the light of the criteria which, according to the case-law, relate to the concept of 'undertaking' referred to in paragraph 40 above, those considerations demonstrate to the requisite legal standard that the activity at issue, owing to its nature, its aim and the rules to which it is subject, is not connected with the exercise of public powers but that it is economic in nature. None of the arguments put forward by the Kingdom of Spain can show that the Commission erred in classifying the activity in question as an economic activity.

43 First, in so far as the Kingdom of Spain emphasizes that the extension of DTT was achieved by public undertakings acting as the specific 'instrumental means' of the administration, it should be observed that, as regards the possible application of the competition rules, it is necessary to distinguish the situation in which the State acts in the exercise of public powers and that in which it carries out economic activities of an industrial or commercial nature consisting in offering goods or services on the market. In that regard, it is irrelevant that the State acts directly through a body forming part of the public administration or through an entity on which it has conferred special or exclusive rights (see judgments in *Diego Calì & Figli*, cited in paragraph 40 above, EU:C:1997:160, paragraphs 16 and 17 and the case-law cited, and of 12 July 2012 in *Compass-Datenbank*, C-138/11, ECR, EU:C:2012:449, paragraph 35 and the case-law cited). In addition, the fact that an activity may be

exercised by a private undertaking amounts to further evidence that the activity in question may be described as a business activity (judgment of 24 October 2002 in *Aéroports de Paris* v *Commission*, C-82/01 P, ECR, EU:C:2002:617, paragraph 82).

44 Second, as regards the Kingdom of Spain's argument that there was no market for the service designed to ensure the right of every person to receive televisual communication, it should be observed that, as the Commission points out in recitals 97 and 99 of the contested decision, there was a market for the service of the deployment of the digital network in Spain. It is common ground that a European satellite operator was interested in supplying the service in question in Area II in the context of the call for tenders launched in 2008 in Cantabria (Spain); and the existence of a market for the deployment of the digital network in Spain is apparent from the fact that, in Area I, that activity was carried out by private undertakings.

45 Third, in so far as the Kingdom of Spain emphasizes that the undertakings in question received no consideration for that activity, it is sufficient to point out that the question whether the activity in question was economic in nature does not depend on whether a private investor is prepared to carry it out on the same terms or on whether the activity is profitable (see, to that effect, judgment in *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle* v *Commission*, cited in paragraph 35 above, EU:C:2012:821, paragraph 50). In addition, the fact that the services are provided free of charge does not prevent an activity from being classified as an economic activity (judgment of 23 April 1991 in *Höfner and Elser*, C-41/90, ECR, EU:C:1991:161, paragraphs 19 to 23). The fact that, as the Kingdom of Spain asserts, the action programmes of the Autonomous Communities do not entail any change in the ownership of the digital broadcasting centres, which remain in the public ownership, plays no part in the classification of the activity in question.

46 Fourth, the Kingdom of Spain claims that the Commission's observation in recital 99 and footnote 50 of the contested decision, that the deployment of the digital network in Area II carried out by the Autonomous Communities, public undertakings and municipal authorities concerned only the transmission of national and regional private channels, is incorrect. That argument cannot be accepted. It must be stated that Royal Decree 944/2005 required national broadcasters to cover 96% of the population in the case of the private sector and 98% of the population in the case of the public sector in their respective territories (see paragraph 2 above). While it is a fact that Areas I and II included 98.5% of the Spanish population and that the obligation placed on national broadcasters in the case of public broadcasters to cover in their respective territories 98% of the population therefore did not require them to cover Area II, the fact remains that, for virtually all of that area, such an obligation to provide coverage ensured access to the public channels, as the topography of Area III precluded digital terrestrial transmission (see paragraph 3 above).

47 The first part of the present plea must therefore be rejected.

Second part, alleging that there was no economic advantage and that there was an SGEI

48 The Kingdom of Spain claims that the measure at issue is not selective because the operation of radio and television broadcasting networks is an SGEI under Spanish law. In its submission, the entities concerned received no economic advantage within the meaning of Article 107(1) TFEU, because the criteria laid down by the Court of Justice in the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 17 above (EU:C:2003:415), had been satisfied. In addition, the Commission did not undertake any assessment on the basis of the provisions adopted by it relating to the existence of an SGEI. According to the Kingdom of Spain, DTT was the most effective solution for the transition from analogue television to digital television in Area II in terms of costs in Spain, which was demonstrated by a study dating from July 2007. According to that study, the costs involved in using satellite television in order to increase coverage from 96% to 100% of the population would be

higher than those involved in using terrestrial television. The Commission did not undertake a thorough analysis of that study and merely examined the case of the Autonomous Community of the Basque Country.

49 As a preliminary point, it should be observed that the Kingdom of Spain claims that the measure at issue is not selective because, in its submission, the service concerned is an SGEI. It should be borne in mind that the question whether the service concerned constitutes an SGEI is a criterion independent of that relating to the selective nature of State aid for the purposes of Article 107(1) TFEU. In fact, while the question whether the service concerned constitutes an SGEI is a relevant factor as regards the existence of an economic advantage, the selective nature of a measure concerns the requirement that State aid must favour certain undertakings or the production of certain goods (see paragraph 33 above).

50 As the Kingdom of Spain has wholly failed to substantiate the assertion that the measure at issue did not favour certain undertakings, it must be stated that, in the context of the present part of the plea, it claims, in essence, that the measure at issue did not obtain any economic advantage for the recipients, within the meaning of Article 107(1) TFEU. In its submission, the Commission was wrong to find that there was an economic advantage when it considered that the four criteria laid down in the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 17 above (EU:C:2003:415), were not satisfied in the present case.

51 It should be borne in mind that, in the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 17 above (EU:C:2003:415), the Court of Justice observed that, where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings did not enjoy a real financial advantage and the measure thus did not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such a measure was not caught by Article 107(1) TFEU. However, for such compensation to escape classification as State aid in a particular case, four cumulative conditions must be satisfied (judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 17 above, EU:C:2003:415, paragraphs 87 and 88).

52 It is apparent from recitals 114 to 128 of the contested decision that in the Commission's view the first and fourth criteria laid down in the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 17 above (EU:C:2003:415), were not satisfied in the present case.

– The first criterion laid down in the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 17 above (EU:C:2003:415), relating to the performance of public service obligations

53 According to this criterion, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined (judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 17 above, EU:C:2003:415, paragraph 89).

54 It should be observed that the Commission considered, in recitals 119 to 126 of the contested decision, that the first criterion in the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 17 above (EU:C:2003:415), was not satisfied.

55 According to recital 119 of the contested decision, Spanish law did not declare the operation of a terrestrial network to be a public service. Ley 11/1998, General de Telecomunicaciones (General Law 11/1998 on telecommunications) of 24 April 1998 (BOE No 99, of 25 April 1998, p. 13909, 'Law 11/1998') states that telecommunications services, including operation of networks supporting radio and television, are SGEIs but do not have the status of public services, which are reserved for only a limited number of telecommunications services, including those associated with public defence and

civil protection, and the operation of the telephone network. Ley 32/2003, General de Telecomunicaciones (General Law 32/2003 on telecommunications) of 3 November 2003 (BOE No 264, of 4 November 2003, p. 38890, 'Law 32/2003') maintains the same qualification. The transmission services for the broadcasting of television, that is to say, the transport of signals through the telecommunications networks, are considered to be telecommunications services and as such are SGEIs but not a public service.

56 According to recital 120 of the contested decision, in any event, the provisions of the Spanish law are technologically neutral. The law defines telecommunications as the exploitation of networks and the provision of electronic communications services and associated facilities. Telecommunications is the transmission of signals through any telecom network, and not through the terrestrial network in particular. Moreover, that law states that one of its objectives is to encourage, to the extent possible, technological neutrality in regulation.

57 According to recital 121 of the contested decision, although the law in force and applicable at the time of transfer of funds defined public broadcasting as a public service, it would not be possible to extend that definition to the operation of a particular supporting platform. Moreover, where several transmission platforms exist, one particular platform could not be considered to be essential for the transmission of broadcasting signals. It would therefore, according to the Commission, have constituted a manifest error if the Spanish legislation had declared the use of a particular platform for the transmission of broadcasting signals to be a public service.

58 In addition, the Commission rejected, in recitals 123 and 124 of the contested decision, the argument that the operation of terrestrial networks had been defined as a public service in the interinstitutional conventions concluded between the Basque Government, the Association of Basque Municipal Authorities and the three Basque Regional Councils.

59 In recital 172 of the contested decision, the Commission, referring to recitals 119 to 122 of that decision, found that neither the Kingdom of Spain nor the Basque authorities had clearly defined the operation of a terrestrial platform as a public service.

60 It should be observed that, as regards the concept of public service within the meaning of the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 17 above (EU:C:2003:415), the parties do not dispute that that concept corresponds to the concept of an SGEI within the meaning of Article 106(2) TFEU (see, to that effect, judgments of 12 February 2008 in *BUPA and Others* v *Commission*, T-289/03, ECR, EU:T:2008:29, paragraph 162, and of 16 July 2014 in *Zweckverband Tierkörperbeseitigung* v *Commission*, T-309/12, EU:T:2014:676, paragraph 132).

61 According to a consistent line of decisions, Member States have wide discretion to define what they regard as an SGEI and, consequently, the definition of such services by a Member State can be questioned by the Commission only in the event of manifest error (see judgments of 15 June 2005 in *Olsen* v *Commission*, T-17/02, ECR, EU:T:2005:218, paragraph 216; of 22 October 2008 in *TV2/Danmark and Others* v *Commission*, T-309/04, T-317/04, T-329/04 and T-336/04, ECR, EU:T:2008:457, paragraph 101; and of 6 October 2009 in *FAB* v *Commission*, T-8/06, EU:T:2009:386, paragraph 63). In the absence of EU harmonised rules governing the matter, the Commission is not entitled to rule on the extent of public service tasks assigned to the public operator, such as the level of costs linked to that service, or the expediency of the political choices made in this regard by the national authorities, or the economic efficiency of the public operator (see, to that effect, judgments of 27 February 1997 in *FFSA and Others* v *Commission*, T-106/95, ECR, EU:T:1997:23, paragraph 108, and of 1 July 2010 in *M6* v *Commission*, T-568/08 and T-573/08, ECR, EU:T:2010:272, paragraph 139 and the case-law cited). It follows from the first indent of Article 1 of Protocol No 26 on services of general interest supplementing the EU and FEU Treaties that the shared values of the Union in

respect of SGEIs within the meaning of Article 14 TFEU include, in particular, the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising SGEIs as closely as possible to the needs of the users.

62 However, the Member State's power to define SGEIs is not unlimited and cannot be exercised arbitrarily for the sole purpose of removing a particular sector from the application of the competition rules (judgment in *BUPA and Others* v *Commission*, cited in paragraph 60 above, EU:T:2008:29, paragraph 168). In order to be classified as an SGEI, the service in question must be of a general economic interest exhibiting special characteristics by comparison with the general economic interest of other economic activities (judgments of 10 December 1991 in *Merci convenzionali porto di Genova*, C-179/90, ECR, EU:C:1991:464, paragraph 27, and of 17 July 1997 in *GT-Link*, C-242/95, ECR, EU:C:1997:376, paragraph 53).

63 The scope of the General Court's review of the Commission's assessments necessarily takes account of the fact that a Member State's definition of a service as an SGEI can be questioned by the Commission only in the event of a manifest error. That review must nevertheless ensure respect for certain minimum criteria relating, inter alia, to the presence of an act of the public authority entrusting the operators in question with an SGEI mission, and to the universal and compulsory nature of that mission (see judgment of 7 November 2012 in *CBI* v *Commission*, T-137/10, ECR, EU:T:2012:584, paragraphs 100 and 101 and the case-law cited). Furthermore, under Article 4 of Decision 2005/842/EC of 28 November 2005 on the application of Article [106(2) TFEU] to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of SGEIs (OJ 2005 L 312, p. 67), responsibility for operation of the SGEI is to be entrusted to the undertaking concerned by way of one or more official acts, the form of which may be determined by each Member State, those acts being required to specify, in particular, the nature and the duration of the public service obligations and the undertaking and territory concerned.

64 In the present case, the Kingdom of Spain claims that the Commission was wrong to consider that the service in question did not constitute an SGEI within the meaning of EU law. In its submission, there was a market failure because broadcasters were not interested in bearing additional costs in order to extend the networks in Area II. The fact that the Spanish legislation at issue does not expressly specify that the service in question is a public service does not entitle the Commission not to undertake an evaluation of the service in question on the basis of the provisions adopted by it relating to the existence of an SGEI, especially because that legislation classifies the service in question as a service of general interest. At the hearing, the Kingdom of Spain made clear that the operators concerned had been entrusted with performing public service obligations by all the acts of the Spanish authorities and in particular in the public contracts concluded between those authorities and the operators.

65 That argument does not show that the Commission was wrong to find, in recitals 119 to 122 and 172 of the contested decision, that the service in question, namely the deployment, maintenance and operation of the DTT network in Area II, had not been precisely defined as a public service within the meaning of the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 17 above (EU:C:2003:415).

66 Admittedly, the service of operating the radio and television broadcasting networks was classified by the Spanish State as a service of general interest, under Article 2 of Law 11/1998 and Law 32/2003, produced by the Commission following the measures of organisation of procedure ordered by the Court (see paragraph 26 above), read in conjunction with Article 1 of those laws.

67 However, it follows from Article 2 of Law 11/1998 and Law 32/2003 that that classification applies to all telecommunications services, including the radio and television broadcasting networks. The mere fact that a service is designated in national law as being of general interest does not mean that any operator providing that service is entrusted with performing clearly defined public service obligations

within the meaning of the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 17 above (EU:C:2003:415). If that were the case, all telecommunications services in Spain would be in the nature of SGEIs within the meaning of that judgment, which does not follow from those laws. In that regard, it should also be stated that Article 2(1) of Law 32/2003 expressly provides that services of general interest within the meaning of that law must be supplied in the context of a framework of free competition. However, the classification of a service as an SGEI within the meaning of the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 17 above (EU:C:2003:415), requires that responsibility for its management be entrusted to certain undertakings.

68 In addition, it should be stated that the Commission did not err in examining, in recitals 119 to 125 of the contested decision, whether the first criterion in the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 17 above (EU:C:2003:415), was satisfied as regards the service consisting in operating terrestrial networks and not as regards the service consisting in operating radio and television broadcasting networks, as the Kingdom of Spain maintains. In that regard, it follows from recital 120 of that decision that the provisions of Law 32/2003 are technologically neutral and that telecommunications were the transmission of signals through any telecom network and not through the terrestrial network in particular, which the Kingdom of Spain has not disputed. In the light of that clarification of the Spanish law, it cannot be concluded that the Commission erred in considering, in recitals 119 and 122 of that decision, that the operation of a terrestrial network was not defined in that law as a public service within the meaning of the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 17 above (EU:C:2003:415).

69 As regards the argument that the operators concerned were entrusted with the performance of public service obligations by all the acts of the Spanish authorities, and in particular in the public contracts concluded between those authorities and the operators, that argument cannot be accepted either.

70 In so far as the Kingdom of Spain refers in that regard to the fact that the national programme promoting the switch to DTT adopted by the Spanish Council of Ministers on 7 September 2007 fixed as the objective to be achieved coverage of the Spanish population by the DTT comparable to coverage of that population by analogue television in 2007, namely more than 98% of that population (see paragraph 4 above), it should be observed that, by that programme, no operator was entrusted with the performance of public service obligations.

71 As regards the public contracts concluded between the public authorities and the operators concerned, it is true that, according to the case-law, the mandate entrusting the public service mission may also encompass contractual acts, provided that they emanate from the public authority and are binding, *a fortiori* where such acts give effect to the obligations imposed by the legislation (see judgment in *CBI* v *Commission*, cited in paragraph 63 above, EU:T:2012:584, paragraph 109 and the case-law cited). In the present case, however, the Kingdom of Spain has provided no contract that would substantiate its assertion. In addition, the mere fact that a service forms the subject-matter of a public contract does not mean that that service automatically assumes, without any specific explanation on the part of the authorities concerned, the status of an SGEI within the meaning of the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 17 above (EU:C:2003:415).

72 As regards the Commission's findings in recitals 123 and 124 of the contested decision, namely that the interinstitutional conventions concluded between the Basque Government, the Association of Basque Municipal Authorities and the three Basque Regional Councils also did not define the operation of a terrestrial network as a public service, those findings have not been disputed by the Kingdom of Spain.

73 Furthermore, it should be stated that the Spanish authorities have not at any time been in a position to determine what public service obligations were entrusted to the operators of DTT networks, either by Spanish law or by the operational conventions, still less to adduce evidence of such obligations.

74 Last, it follows from recital 121 of the contested decision that, according to the Commission, the definition as a public service of the operation of a particular support platform, in this instance the operation of the terrestrial platform, would have constituted a manifest error on the part of the Spanish authorities, because, where several transmission platforms exist, one particular platform cannot be considered to be essential for the broadcasting of signals (see paragraph 57 above), which the Kingdom of Spain has not disputed.

75 It follows that the Commission did not err in considering that, in the absence of a clear definition of the service consisting in the operation of a terrestrial network as a public service, the first criterion in the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 17 above (EU:C:2003:415), was not satisfied.

76 That finding cannot be called into question by the other arguments put forward by the Kingdom of Spain.

77 First, as regards the argument that the Commission was wrong to confine itself to examining only the case of the Autonomous Community of the Basque Country, it must be stated that the Commission also took into account, in recitals 119 and 120 of the contested decision, Law 11/1998 and Law 32/2003, the validity of which is not limited to that Autonomous Community. Furthermore, it follows from recital 114 of that decision that, according to the Spanish authorities, it was for the Autonomous Communities to claim the absence of State aid, in accordance with the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 17 above (EU:C:2003:415), and that, as the best and only example, those authorities put forward the case of the Basque Country. According to that recital, no other Autonomous Community provided reasoning capable of showing that the operation of the terrestrial network was a public service. The Kingdom of Spain cannot therefore criticise the Commission for having focused its examination on the case of the Autonomous Community of the Basque Country. Furthermore, it is settled case-law that the lawfulness 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 (see judgment of 15 April 2008 in *Nuova Agricast*, C-390/06, ECR, EU:C:2008:224, paragraph 54 and the case-law cited).

78 Second, the Kingdom of Spain claims that, in so far as the Commission did not undertake any evaluation on the basis of the provisions adopted by it relating to the existence of an SGEI, it did not comply with paragraph 47 of its Communication on the application of the European Union State aid rules to compensation granted for the provision of SGEIs (OJ 2012 C 8, p. 4). That argument must be rejected. The Commission did indeed state in that paragraph that undertakings entrusted with the operation of SGEIs were undertakings entrusted with a particular task and that, generally speaking, the entrustment of a particular public service task implies the supply of services which, if it were considering its own commercial interest, an undertaking would not assume or would not assume to the same extent or under the same conditions; however, it should be pointed out that, in the contested decision, the Commission did not dispute the existence of an SGEI on the ground of the lack of a market failure, but found that the service in question was not clearly defined as a public service within the meaning of the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 17 above (EU:C:2003:415). The requirement that the mission of a SGEI must be defined by the Member State in order to satisfy the first criterion in that judgment is also stated in that paragraph. Furthermore, the existence of a market failure is insufficient to establish the existence of an SGEI.

– The fourth criterion laid down in the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 17 above (EU:C:2003:415), relating to ensuring the least cost for the community

79 According to this criterion, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations (judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 17 above, EU:C:2003:415, paragraph 93).

80 In recital 128 of the contested decision, the Commission observed that, as there had been no call for tenders, the Basque authorities argued that that criterion was satisfied, owing to the fact that the Basque Government public undertaking which supplied the design and coverage of radio and television broadcasting was a well-run company adequately provided with the means to perform the requested activities. On the basis of a study comparing the costs, which was not communicated to the Commission, the Basque authorities concluded that the satellite infrastructure would have been more expensive than upgrading the terrestrial network of the public undertaking concerned. However, according to the Commission, in order to fulfil the criterion in question, a comparison with satellite technology was not sufficient to establish that that public undertaking was efficient, since there could also have been other terrestrial operators which could have performed that service at lower cost. The Commission therefore concluded that the fourth criterion in the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 17 above (EU:C:2003:415), was not satisfied in the case of the Autonomous Community of the Basque Country.

81 The Kingdom of Spain merely claims, in essence, that, by comparison with the satellite platform, the terrestrial platform was the most cost efficient solution, since the infrastructure already existed for analogue terrestrial television, which was shown by a study dating from July 2007. It therefore does not dispute the Commission's argument that a comparison with satellite technology was not sufficient to show that the Basque Country public undertaking concerned was efficient, since other terrestrial operators could also have provided the service in question at a lower cost.

82 Consequently, the Kingdom of Spain has not shown that the Commission had erred in finding that the requirements of the fourth criterion in the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 17 above (EU:C:2003:415), were not satisfied.

83 In any event, as the criteria laid down in the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 17 above (EU:C:2003:415), are cumulative, it was sufficient for the Commission to show that only one of those criteria was not satisfied in order to be able validly to establish the existence of an economic advantage.

84 The second part of the present plea must therefore be rejected.

Third part, alleging absence of distortion of competition

85 The Kingdom of Spain claims that the Commission erred in its analysis of the distortion of competition in that it considered, in recital 130 of the contested decision, that the terrestrial and satellite platforms operated in the same market. In its submission, digital satellite services are pay services, whereas access to DTT services is free. Furthermore, the Comisión del mercado de la telecomunicaciones (Spanish telecommunications market commission) concluded in its decision of

2 February 2006, that support services for the broadcasting of television and radio signals by satellite should be excluded from the market for the support of television broadcasting by terrestrial waves. In addition, there is no competition in Area II, since that area has no attraction for network operators.

86 It should be pointed out that, in recital 130 of the contested decision, the Commission concluded that the terrestrial and satellite platforms operated in the same market. It substantiated that conclusion, in recitals 131 to 137 of that decision, with reference to seven different factors. Last, in recital 138 of that decision, it concluded that, since satellite and terrestrial broadcasting platforms were in competition with each other, the measure, for the deployment, operation and maintenance of DTT in Area II, entailed a distortion of competition between the two platforms. According to the Commission, other platforms, and in particular Internet television, are disadvantaged by the measure in question.

87 Those considerations are not called into question by the Kingdom of Spain's argument.

88 Thus, it should be borne in mind that the Commission is required, not to establish that the aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition (see judgments of 15 December 2005 in *Unicredito Italiano*, C-148/04, ECR, EU:C:2005:774, paragraph 54 and the case-law cited; of 9 June 2011 in *Comitato 'Venezia vuole vivere' and Others* v *Commission*, C-71/09 P, C-73/09 P and C-76/09 P, ECR, EU:C:2011:368, paragraph 134 and the case-law cited; and of 8 May 2013 in *Libert and Others*, C-197/11 and C-203/11, ECR, EU:C:2013:288, paragraph 76 and the case-law cited).

89 In particular, when aid granted by a Member State strengthens the position of an undertaking by comparison with other undertakings competing in trade within the EU, the latter undertakings must be regarded as affected by that aid (see judgments in *Unicredito Italiano*, cited in paragraph 88 above, EU:C:2005:774, paragraph 56 and the case-law cited, and in *Libert and Others*, cited in paragraph 88 above, EU:C:2013:288, paragraph 77 and the case-law cited).

90 First, as regards the argument that the fact that the terrestrial and satellite platforms did not operate on the same market is demonstrated by the fact that digital satellite television services are pay services, whereas access to DTT services is free, it should be stated that, as the Commission asserts, in technological terms, the two platforms are capable of serving as a vector for offers of pay or free television. In addition, holders of DTT broadcasting licences in Spain may broadcast pay channels and the Spanish offer of DTT may encompass pay channels and free channels. That argument must therefore be rejected.

91 Second, as regards the conclusions of the Comisión del mercado de la telecomunicaciones on which the Kingdom of Spain relies, those conclusions cannot call into question the Commission's finding in the contested decision. The Kingdom of Spain has not specified either the cases in which that commission drew those conclusions or the reasons why it concluded in those cases that the terrestrial and satellite platforms did not operate on the same market.

92 Third, as regards the argument relating to the absence of competition in Area II, it must also be rejected. The existence of competition in that area is demonstrated, in particular, by the fact that a satellite platform operator participated in a call for tenders concerning the extension of digital television coverage in Cantabria, as the Commission revealed in recital 131 of the contested decision. Furthermore, it has already been held that there was competition between terrestrial and satellite platforms (judgments in *FAB* v *Commission*, cited in paragraph 61 above, EU:T:2009:386, paragraph 55, and of 15 June 2010 in *Mediaset* v *Commission*, T-177/07, ECR, EU:T:2010:233, paragraph 97).

93 The third part of the present plea and, consequently, the plea in its entirety must therefore be rejected.

Second plea, alleging, in the alternative, infringement of Article 106(2) TFEU and Article 107(3) TFEU

94 The Kingdom of Spain claims, in the alternative, that the Commission infringed Article 106(2) TFEU and Article 107(3)(c) TFEU. In that regard, it asserts that the Commission reversed the burden of proof, in so far as it did not clearly show that that there had been a breach of the principle of technological neutrality. In the applicant's submission, the Commission did not state reasons for the extrapolation method which it had used in order to conclude that most of the calls for tenders were not technologically neutral. Nor did the Commission justify the statistical methodology applied, and it is therefore impossible to ascertain the precise calls for tenders to which it refers in footnote 29 of the contested decision. The sample chosen by the Commission is not representative. The Kingdom of Spain submits that the extrapolation technique was used arbitrarily and exceeded the Commission's discretion.

95 In the first place, as regards the alleged infringement of Article 106(2) TFEU, it should be noted that in recital 172 of the contested decision, the Commission rejected the justification for the aid measure in question on the basis of that provision, being of the view that the Spanish authorities had not clearly defined the operation of a terrestrial platform as a public service. The Commission referred in that regard to its reasoning concerning the first criterion in the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 17 above (EU:C:2003:415), concerning the absence of a definition of an SGEI.

96 As the Kingdom of Spain's argument relating to the existence of an SGEI has already been rejected, and as that Member State has put forward no additional argument in the context of the present plea, it must be concluded that the Commission has not infringed Article 106(2) TFEU.

97 In the second place, as regards the alleged infringement of Article 107(3)(c) TFEU, it should be observed that, according to settled case-law, derogations from the general principle, set out in Article 107(1) TFEU, that State aid is incompatible with the internal market are to be strictly interpreted (see judgments of 29 April 2004 in *Germany* v *Commission*, C-277/00, ECR, EU:C:2004:238, paragraph 20 and the case-law cited, and of 14 October 2010 in *Nuova Agricast and Cofra* v *Commission*, C-67/09 P, ECR, EU:C:2010:607, paragraph 74 and the case-law cited).

98 In addition, it should be borne in mind that, according to settled case-law, in the application of Article 107(3)(c) TFEU, the Commission has a wide discretion, the exercise of which involves economic and social assessments. Judicial review of the manner in which that discretion is exercised is confined to establishing that the rules of procedure and the rules relating to the duty to state reasons have been complied with and to verifying the accuracy of the facts relied on and that there has been no error of law, manifest error of assessment in regard to the facts or misuse of powers (judgments of 26 September 2002 in *Spain* v *Commission*, C-351/98, ECR, EU:C:2002:530, paragraph 74, and of 29 April 2004 in *Italy* v *Commission*, C-372/97, ECR, EU:C:2004:234, paragraph 83).

99 It should also be borne in mind that, while the Commission has a margin of discretion with regard to economic matters, that does not mean that the Courts of the European Union must refrain from reviewing the Commission's interpretation of information of an economic nature. Indeed, the Courts of the European Union must establish not only whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it. However, when conducting such a review, the Courts of the European Union must not substitute their own economic assessment for that of the Commission. Moreover, it must be noted that, where an institution has a wide discretion, the review of observance of certain procedural guarantees is of fundamental importance. According to the case-law, those guarantees include the obligation for the competent institution to examine carefully and impartially all the relevant elements of the individual case and to give an adequate statement of the reasons for its decision (see judgment of 22 November 2007 in *Spain* v *Lenzing*, C-525/04 P, ECR, EU:C:2007:698,

paragraphs 56 to 58 and the case-law cited). The Commission is required to conduct a diligent and impartial examination of the contested measures, so that it has at its disposal, when adopting the final decision establishing the existence and, as the case may be, the incompatibility or unlawfulness of the aid, the most complete and reliable information possible for that purpose (see judgment of 3 April 2014 in *France* v *Commission*, C-559/12 P, ECR, EU:C:2014:217, paragraph 63 and the case-law cited).

100 In order to establish that the Commission made a manifest error in assessing the facts so as to justify the annulment of the contested decision, the evidence adduced by the applicant must be sufficient to make the factual assessment used in the decision implausible (judgments of 12 December 1996 in *AIUFFASS and AKT* v *Commission*, T-380/94, ECR, EU:T:1996:195, paragraph 59, and in *FAB* v *Commission*, cited in paragraph 61 above, EU:T:2009:386, paragraph 78).

101 In the present case, it is apparent from recitals 148 to 171 of the contested decision that the Commission considered that the aid at issue could not be regarded as comparable with the internal market pursuant to Article 107(3)(c) TFEU because, in its view, the measure at issue did not comply with the principle of technological neutrality, it was not proportionate and it did not constitute an appropriate instrument to ensure coverage of free-to-air channels for residents in Area II. In that regard, the Commission stated, in recital 155 of that decision, that the vast majority of tenders had not been technologically neutral, since they referred to terrestrial technology and DTT. In that context, it referred to the description of the aid in question set out in recitals 23 to 36 of that decision.

102 In recital 34 of the contested decision, the Commission stated that in most calls for tenders the organising authorities referred explicitly, through the definition of the object of the calls for tender, and/or implicitly, in the description of the technical specifications or the equipment to be financed, to terrestrial technology and DTT. In the few cases where satellite technology was expressly mentioned, those references were to satellite dishes for the reception of the satellite signal on terrestrial towers or equipment to access digital television in Area III. According to the Commission, very few calls for tenders relating to the extension of coverage were technologically neutral and did not exclude technologies other than DTT.

103 In that regard, in footnote 29 of the contested decision, the Commission stated that, out of 516 calls for tenders launched by all the regions except Castilla-La Mancha, it had analysed 82, 17 of which related to the extension of coverage and 65 to supply. Only nine of them could be classified as technologically neutral, namely three calls for tenders relating to the extension of coverage in Castilla y Leon (Spain) and six calls for tenders for supply, five in the Canary Islands (Spain) and one in Cantabria.

104 In concluding on the basis of that sample that the measure in question did not respect the principle of technological neutrality, the Commission did not make a manifest error or reverse the burden of proof concerning compliance with that principle. It was not required to go into any more detail in that regard. In the case of an aid scheme, it may confine itself to examining the characteristics of the scheme in question in order to determine, in the grounds of its decision, whether the scheme is appropriate for achieving one of the objectives referred to in Article 107(3) TFEU. Thus, in a decision which concerns such a scheme, the Commission is not required to carry out an analysis of the aid granted in individual cases under the scheme. It is only at the stage of recovery of the aid that it is necessary to look at the individual situation of each undertaking concerned (judgments of 7 March 2002 in *Italy* v *Commission*, C-310/99, ECR, EU:C:2002:143, paragraphs 89 and 91; in *Comitato 'Venezia vuole vivere' and Others* v *Commission*, cited in paragraph 88 above, EU:C:2011:368, paragraph 63; and of 13 June 2013 in *HGA and Others* v *Commission*, C-630/11 P to C-633/11 P, ECR, EU:C:2013:387, paragraph 114).

105 In that regard, the Kingdom of Spain's argument that the Commission ought not merely to have analysed a sample of the calls for tenders, but ought to have identified all the tenders in the contested decision, must be rejected. According to the case-law, where the Commission rules in a general and abstract way on a scheme of State aid, which it declares incompatible with the internal market, and orders recovery of the amounts received under that scheme, it is for the Member State to verify the individual situation of each undertaking concerned by a recovery operation (judgment in *Comitato 'Venezia vuole vivere' and Others* v *Commission*, cited in paragraph 88 above, EU:C:2011:368, paragraph 64).

106 Nor can the Kingdom of Spain's argument that the sample was not sufficiently relevant because, out of the 82 calls for tenders analysed by the Commission, 65 were calls for tenders for supply which were not affected by the contested decision, be accepted. The 17 calls for tenders relating to extension of the network that were analysed by the Commission represent, in any event, a sufficiently relevant sample in the present case, having regard in particular to the fact that the administrative procedure related to 16 Autonomous Communities in Spain.

107 As regards the Kingdom of Spain's argument that the Commission did not justify the extrapolation method used in order to arrive at the conclusion that most of the calls for tenders were not technologically neutral, it should be observed that, contrary to the Kingdom of Spain's contention, the Commission did not employ extrapolation when it considered that the irregularities found for the sample were reproduced throughout Spain. The Commission merely studied the characteristics of the aid scheme at issue and correctly did not conclude that, because the calls for tenders which it analysed did not respect the principle of technological neutrality, that principle was not respected in all the calls for tenders concerned by the operation of the DTT network, which is reflected, in particular, in the operative part of the contested decision. According to Articles 1 and 3 of that decision, the Kingdom of Spain is required only to recover from the DTT operators the aid granted in a manner that did not comply with the principle of technological neutrality. Under Article 4(3)(a) of the contested decision, moreover, the Kingdom of Spain is required to submit to the Commission the list of beneficiaries that have received aid under the scheme referred to in Article 1 of that decision and the total amount of aid received by each of them under that scheme, broken down by the categories indicated in section 6.2 of that decision.

108 It should be observed, moreover, that the Kingdom of Spain, which, in order to fulfil its duty to cooperate with the Commission, was required to provide all the information necessary to enable the Commission to verify that the conditions for the derogation from which it sought to benefit were satisfied (see judgment of 15 June 2005 in *Regione autonoma della Sardegna* v *Commission*, T-171/02, ECR, EU:T:2005:219, paragraph 129 and the case-law cited), has not shown that, in addition to the nine calls for tenders which the Commission considered to be technologically neutral, other calls for tenders also satisfied that criterion. In recitals 182 to 197 of the contested decision, the Commission set out factors that enabled the calls for tenders to be classified as technologically neutral. The Kingdom of Spain has therefore not adduced sufficient evidence to render the Commission's factual assessments implausible.

109 In that regard, it should also be stated that, contrary to the Kingdom of Spain's assertion, the Commission did not acknowledge, in its letter of 9 December 2013 sent to the Spanish authorities during the recovery phase of the aid at issue, that it had been wrong to consider that six calls for tenders were neutral. In that letter, the Commission stated only that the calls for tenders relating to the supply of equipment were not subject to the recovery obligation, which is also apparent from Articles 1 and 3 of the contested decision, read in the light of recitals 110, 111 and 185 of that decision.

110 Last, in so far as the Kingdom of Spain asserts that the Commission did not specify the 82 calls for tenders which it had analysed, it claims in essence that there has been a breach of the obligation to state reasons. According to consistent case-law, the scope of the obligation to state reasons depends

on the nature of the measure in question and on the context in which it was adopted. The statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure, so as to enable the Courts of the European Union to exercise their power of review and to enable the persons concerned to ascertain the reasons for the measure in order that they can defend their rights and ascertain whether or not the measure is well founded. It is not necessary for the statement of reasons to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU 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 (judgments of 2 April 1998 in *Commission* v *Sytraval and Brink's France*, C-367/95 P, ECR, EU:C:1998:154, paragraph 63, and of 3 March 2010 in *Freistaat Sachsen and Others* v *Commission*, T-102/07 and T-120/07, ECR, EU:T:2010:62, paragraph 180). In the present case, since the Spanish authorities supplied all the information relating to the tenders in question and the Commission specified in the contested decision the criteria that enabled the tenders concerned to be classified as technologically neutral, the statement of reasons for that decision was sufficiently clear for the Kingdom of Spain to ascertain the reasons for the measure adopted and the Courts of the European Union to exercise their power of review.

111 The Kingdom of Spain's argument relating to an alleged infringement of Article 107(3)(c) TFEU must therefore be rejected.

112 Consequently, the second plea must be rejected.

Third plea, alleging breach of the rules of procedure

113 The Kingdom of Spain takes issue with the Commission for having breached the rules of procedure in that, first, it did not take the evidence supplied by the Kingdom of Spain into consideration; second, the conduct of the administrative procedure was incoherent; third, there were excessive delays and changes of investigating officer during the administrative procedure; and, fourth, there was a lack of objectivity and impartiality throughout the inquiry during the investigation procedure.

114 The Commission disputes that line of argument and claims that, since the Kingdom of Spain has not mentioned any procedural provision that has been breached, this plea is inadmissible.

115 In that regard, it should be borne in mind that, under Article 44(1)(c) of the Rules of Procedure of 2 May 1991, the application is to contain a summary of the pleas in law on which it is based. That information must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court to rule on the action. It should also be borne in mind that an applicant is not required to state expressly the specific legal rule on which his complaint is based, provided that his argument is sufficiently clear for the opposing party and the Courts of the European Union to identify that rule without difficulty (see judgment of 20 February 2013 in *Caventa v OHIM — Anson's Herrenhaus (BERG)*, T-224/11, EU:T:2013:81, paragraphs 14 and 15 and the case-law cited).

116 In the present case, the Kingdom of Spain's line of argument satisfies those requirements and is therefore admissible. It should be noted that the Kingdom of Spain referred on several occasions, in the context of its argument, to the Commission's reasoning concerning the question of the compatibility of the measure at issue with the internal market under Article 107(3)(c) TFEU. Furthermore, the complaints relating to the failure to take into account elements of fact, to the lack of coherence, to the excessive duration of the procedure and to the lack of objectivity and impartiality relate, in essence, to the requirements of the principle of sound administration. It therefore follows to the requisite legal standard from the application that the Kingdom of Spain claims that there has been a breach of the principle of sound administration by the Commission in its examination of the compatibility of the measure in question with the internal market under Article 107(3)(c) TFEU. With regard to the principle of sound administration in the case of State aid, it is settled case-law that

observance of that principle requires a diligent and impartial investigation by the Commission of the measure at issue (see judgment of 9 September 2009 in *Holland Malt* v *Commission*, T-369/06, ECR, EU:T:2009:319, paragraph 195 and the case-law cited).

First complaint, alleging failure to take certain evidence into account

117 The Kingdom of Spain claims that the Commission did not take into consideration all the evidence relating to the comparison of the costs associated with the terrestrial and satellite platforms.

118 First, the Kingdom of Spain asserts that the Commission, without stating valid reasons for doing so, failed to take into consideration in the contested decision the report relating to the reference costs of the process of the universalisation of DTT in Spain, dating from July 2007 and prepared by the Spanish authorities, which made a preliminary finding to the effect that DTT would be more efficient by comparison with the satellite platform.

119 That argument must be rejected. It follows from recitals 52 and 156 of the contested decision that the Commission took the report referred to in paragraph 118 into account. Recital 52 contains the Spanish authorities' summary of that report. In recital 156 to the contested decision, the Commission examined the report. In that regard, the Commission stated that the report in question did not sufficiently demonstrate the superiority of the terrestrial platform over satellite. According to the Commission, the report in question concluded, on the contrary, that the choice of a particular technological solution for the extension of coverage should be examined on a region-by-region basis, taking account of the topographic and demographic particularities of every region. The Commission considered that the report advocated instead the need to carry out a technologically neutral call for tenders in order to determine which platform was the most suitable.

120 It should be observed that it follows from paragraph 6 of the report referred to in paragraph 118 above that the Spanish authorities analysed two possible scenarios, namely the extension of coverage of the population from 98% to 100% and the extension of the coverage of the population from 96% to 100%. Neither of those two scenarios corresponds to the extension of coverage of the population from 96% to 98.5%. In addition, according to the conclusions of that report relating to those two scenarios, it was likely that the most appropriate final outcome would be achieved if both alternatives, namely the terrestrial and satellite platforms, were taken into consideration, one or the other solution being chosen depending on the case, according to the conditions and circumstances of the physical location of the population to which coverage would be extended. It is impossible to predict the proportion in which each alternative would contribute to the final outcome without first carrying out a detailed study for each Autonomous Community, having regard to the orography of the land, the territorial distribution of the population and the situation of the existing television broadcasting network. As the Commission asserts, the report in question does not therefore conclude in favour of terrestrial technology in the context of Area II. It should be observed, moreover, that, contrary to the Kingdom of Spain's assertion, the Commission did not consider that that report had not been drawn up by an independent expert.

121 Second, the Kingdom of Spain's argument that the Commission did not commission its own report into the costs of the different solutions, contrary to what it had announced, must be rejected. In fact, the Kingdom of Spain has not shown that the Commission had undertaken to carry out its own study, and, moreover, the Commission denies having done so. Contrary to the Kingdom of Spain's assertion, the Commission's letter of 27 May 2011 to the Spanish authorities contains no undertaking by the Commission in that respect.

122 Third, the Kingdom of Spain claims that the Commission merely endorsed the study produced by the operator referred to in paragraph 13 above, which, however, had been prepared *ex post facto*. It maintains that the Autonomous Community of the Basque Country submitted its own estimate of the

costs in reply to the Commission's request for information of 14 February 2012. That estimate shows that the costs of the DTT solution were lower. In addition, the Autonomous Communities of Andalusia (Spain), Galicia (Spain) and the Basque Country sent the Commission a copy of the presentation drawn up by that operator, indicating the costs of the satellite solution. The Kingdom of Spain maintains that, according to the evaluation of those Autonomous Communities, that operator's offers would have entailed higher costs than those of the terrestrial solution. The Commission failed to take those factors into account in the contested decision. In addition, in favouring the study produced by that operator, the Commission demonstrated partiality.

123 In that regard, it should be observed that, contrary to the Kingdom of Spain's assertion, the rejection of the calculations submitted by certain Autonomous Communities during the procedure before the Commission was not based on the study prepared by the operator referred to in paragraph 13 above. It follows from recital 157 of the contested decision that the Commission rejected those calculations because, in addition to uncertainty about the date on which they were prepared, none of them was sufficiently detailed and robust to justify the choice of terrestrial technology to extend the coverage. In addition, the Commission maintained that none of those calculations was carried out by an independent expert.

124 In recital 158 of the contested decision, the Commission referred to the study submitted by the operator referred to in paragraph 13 above, which dated from November 2008, as is apparent from recital 67 of that decision, in order to underline the contradictions in a study submitted by a telecommunications infrastructure operator/network equipment supplier by comparison with that study. However, it did not endorse the results of the latter study, but merely asserted that the costs submitted by that telecommunications infrastructure operator/network equipment supplier could not be used because they dated from 2010 and therefore post-dated the measures at issue.

125 It follows that the Commission took the calculations submitted by certain Autonomous Communities into account and that it did not in any way favour the study submitted by the operator referred to in paragraph 13 above. The Kingdom of Spain's argument must therefore be rejected.

126 Fourth, the Kingdom of Spain claims that the Commission erred in failing to take into account a comparative report of the costs of reception for DTT and satellite users, prepared by a firm of consultants and dating from 20 September 2012, which found that satellite costs would be 7.7 times higher than DTT costs.

127 That argument must be rejected. The report referred to in paragraph 126 above, which had been submitted to the Commission in the context of another case with which it was dealing, compares the costs involved in adapting the television receiving equipment in each household for the entire Spanish population, and not just for Area II, following the freeing-up of the digital dividend. Furthermore, it compares the costs on the basis of the situation existing in 2012. The Kingdom of Spain provides no evidence on which it might be considered that calculations relating to that situation would have been relevant in evaluating the appropriateness of the measures at issue as from 2008 and, according to the case-law, the question whether a measure constitutes State aid must be resolved in the light of the situation existing at the time when the measure was adopted (see judgment of 12 May 2011 in *Région Nord-Pas-de-Calais and Communauté d'Agglomération du Douaisis* v *Commission*, T-267/08 and T-279/08, ECR, EU:T:2011:209, paragraph 143 and the case-law cited).

128 The first complaint must therefore be rejected.

Second complaint, alleging lack of coherence in the conduct of the administrative procedure

129 The Kingdom of Spain claims that the Commission was wrong to confine itself initially to examining the MITT measures. The more detailed examination of the measures adopted by the Autonomous Communities was not incorporated in the Commission's analysis until later. The process of extending coverage was carried out in a neutral framework, as the Commission confirmed in a letter of 17 April 2009. In the Kingdom of Spain's submission, it may be that, during that process, one or another call for tenders was not neutral. However, the Commission assumes that the entire process was not neutral and suspects all the calls for tenders of not having been neutral, in the absence of proof to the contrary. The investigation leading to the adoption of the contested decision was closed prematurely, since the contested decision requires the Member State to supplement it and to examine all the calls for tenders on a case-by-case basis. Proof in that respect lies in the Commission's contradiction concerning the call for tenders launched by the Government of Cantabria. Although the Commission considered that many of the calls for tenders were not technologically neutral, it considered that the call for tenders launched by that Government was technologically neutral, which, however, is not the case.

130 That argument cannot be upheld.

131 First, even on the assumption that the starting point for the Commission's examination was the MITT measures, the Kingdom of Spain expressly acknowledges that the Commission, in the procedure before it, also examined the measures submitted by the Autonomous Communities.

132 In so far as the Kingdom of Spain alleges incoherence in that regard between the decision to initiate the procedure and the contested decision, it is sufficient to observe that, according to Article 6(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1), the decision to initiate the formal investigation procedure is to summarise the relevant issues of fact and law, to include a preliminary assessment of the Commission as to the aid character of the proposed measure and to set out the doubts as to its compatibility with the internal market. As is apparent from the wording of the provision cited above, the Commission's assessment is necessarily preliminary in nature. It follows that the Commission cannot be required to present a complete analysis of the aid in question in its notice of intention to initiate that procedure (see judgments of 1 July 2009 in *ISD Polska and Others* v *Commission*, T-273/06 and T-297/06, ECR, EU:T:2009:233, paragraph 126 and the case-law cited, and of 30 November 2009 in *France* v *Commission*, T-427/04 and T-17/05, ECR, EU:T:2009:474, paragraph 148 and the case-law cited). As for the decision to initiate the procedure, it follows from the case-law that the stage for reviewing aid referred to in Article 108(2) TFEU is designed to enable the Commission to be fully informed of all the facts of the case (judgment in *Commission* v *Sytraval and Brink's France*, cited in paragraph 110 above, EU:C:1998:154, paragraph 38). It follows that the fact that the decision to initiate the procedure does not refer to certain matters cannot allow the conclusion that the procedure carried out by the Commission was incoherent. Contrary to the Kingdom of Spain's assertion, moreover, the Commission did not consider in the decision to initiate the procedure that the Spanish Government had required the Autonomous Communities to digitise broadcasts using terrestrial technology.

133 Second, as regards the Commission's letter of 17 April 2009, the Kingdom of Spain puts forward no reason why the Commission would not have been entitled to examine the existence of an infringement of Article 107(1) TFEU after receiving a complaint on 18 May 2009.

134 Third, as regards the argument that the Commission acted prematurely in closing the procedure, leaving it to the Kingdom of Spain to examine each call for tenders, it is sufficient to recall that, in the case of an aid scheme, the Commission may confine itself to studying the characteristics of the scheme in question in order to assess, in the grounds of the decision, whether that scheme is appropriate for achieving one of the objectives referred to in Article 107(3) TFEU. Thus, in a decision

which concerns such a scheme, the Commission is not required to carry out an analysis of the aid granted in individual cases under the scheme. It is only at the stage of recovery of the aid that it is necessary to look at the individual situation of each undertaking concerned (see paragraph 104 above).

135 As regards, in that respect, the call for tenders launched in Cantabria, it is the case that certain documents relating to the transmission and reception of satellite television were required in that call for tenders. However, the fact that terrestrial and satellite operators, including a European satellite operator, participated in that call for tenders contradicts the Kingdom of Spain's argument that that call for tenders was not technologically neutral.

136 Consequently, the second complaint must be rejected.

Third complaint, alleging excessive duration of the procedure and changes in the officer conducting the investigation

137 The Kingdom of Spain claims that the duration of the procedure before the Commission was excessive. In its submission, according to the normal time limits, the Commission ought to have completed that procedure before March 2012. That period was attributable to changes in the Commission's team conducting the investigation of the case.

138 It should be stated that, where the aid scheme at issue was not notified, as in the present case, it is unequivocally clear from the wording of Article 4(5) of Regulation No 659/1999 and from the wording of Article 7(6) of that regulation that those articles are not applicable. Moreover, Article 13(2) of that regulation expressly provides that, in cases of possible unlawful aid, the Commission is not bound by the time-limits set out, in particular, in Article 4(5) and Article 7(6) of that regulation. That conclusion is also clear in the light of the case-law of the Court of Justice to the effect that, where the scheme at issue has not been notified, the Commission is not bound by the two-month time period provided for in Article 4(5) of that regulation (see judgment in *HGA and Others* v *Commission*, cited in paragraph 104 above, EU:C:2013:387, paragraphs 74 and 75 and the case-law cited).

139 It should be remembered, however, that the Commission is required to act within a reasonable time in procedures for examining State aid and that it is not allowed to persist in refraining from taking action during the preliminary examination phase. Moreover, the reasonableness of the period taken up by proceedings is to be appraised in the light of the circumstances specific to each case, such as its complexity and the conduct of the parties (see judgment in *HGA and Others* v *Commission*, cited in paragraph 104 above, EU:C:2013:387, paragraphs 81 and 82 and the case-law cited).

140 First, the preliminary examination phase, namely the phase between receipt of the complaint informing the Commission of the existence of alleged aid, on 18 May 2009, and the initiation of the formal examination procedure, on 29 September 2010, lasted slightly over 16 months. That period cannot be regarded as excessive in circumstances such as those of the present case, which were characterised, in particular, by the involvement of the Spanish authorities at central, regional and municipal level and by the time needed to supply further information, as is apparent from recitals 3 and 4 of the decision to initiate the procedure.

141 Second, the formal examination procedure, namely the procedure between the initiation of that procedure, on 29 September 2010, and the adoption of the contested decision, on 19 June 2013, lasted slightly under 33 months. In that regard, it should be noted that it is apparent from recital 4 of the contested decision that the Spanish authorities asked the Commission to extend the deadline set for submission of their observations. In addition, it is apparent from recitals 4 and 5 of that decision that, in addition to the observations of the Spanish Government, the Commission received many observations from Autonomous Communities and interested undertakings. The latter observations

required a response from the Spanish authorities. It is apparent from recitals 6 and 7 of the contested decision that a number of meetings were held between the Commission, the Spanish undertakings and the undertakings concerned, that all interested parties provided information on their own behalf and that the Commission was nonetheless required to address a request for further information to the Spanish authorities, which replied only after the relevant deadline had been extended. In those circumstances, and having regard to the complexity of the matter in question, even on the assumption that there were changes in the team entrusted with the investigation of the case at the Commission, the duration of the formal examination procedure was not unreasonable (see, to that effect, judgment of 16 October 2014 in *Portovesme* v *Commission*, T-291/11, ECR (Extracts), under appeal, EU:T:2014:896, paragraphs 74 to 76).

142 The third complaint must therefore be rejected.

Fourth complaint, alleging lack of objectivity and impartiality

143 The Kingdom of Spain claims that the Commission did not act objectively and impartially during the administrative procedure. First, it maintains that the Commission took into consideration observations of the operator referred to in paragraph 13 above which did not relate to any request for information. There was a considerable delay before some of those observations were transmitted to the Spanish authorities. Second, while the Commission asked the Spanish authorities to supply non-confidential versions of their observations, it acceded to that operator's request that its observations should not be disclosed to third parties. The Spanish authorities were therefore unable to send that operator's observations to involved third parties. Third, in recitals 158, 162 to 164 and 166 of the contested decision, the Commission considered that that operator's observations were valid, without having examined them or compared them with the observations of the Spanish authorities.

144 In the first place, as regards the argument that the Commission took into account observations produced spontaneously by the operator referred to in paragraph 13 above and delayed transmitting those observations to the Spanish authorities, it should be observed that it is apparent from recital 6 of the contested decision that the Spanish authorities also transmitted, on their own initiative, information to the Commission, which it took into consideration. Furthermore, any delay in transmitting the documents cannot, of itself and without more, substantiate the argument that the Commission lacked objectivity and impartiality. That argument must therefore be rejected.

145 In the second place, the argument relating to the Commission's acceptance of the request of the operator referred to in paragraph 13 above that its observations should not be disclosed to third parties does not demonstrate a lack of objectivity and impartiality on the Commission's part. The Commission is required, under Article 24 of Regulation No 659/1999, not to disclose information which it has acquired through the application of that regulation and which is covered by the obligation of professional secrecy (judgment of 8 November 2011 in *Idromacchine and Others* v *Commission*, T-88/09, ECR, EU:T:2011:641, paragraph 43). Nor does the Kingdom of Spain claim not to have received all the documents relevant for its defence.

146 In the third place, in the context of its argument that the Commission regarded the arguments of the operator referred to in paragraph 13 as valid, without having examined them or compared them with the observations of the Spanish authorities, the Kingdom of Spain refers to recitals 158, 162 to 164 and 166 of the contested decision.

147 First, as regards recital 158 of the contested decision, it should be stated that in that recital the Commission assessed the cost studies submitted by a telecommunications infrastructures operator/network equipment supplier. In that regard, it considered that, irrespective of whether those studies could be considered sufficiently independent and robust, the fact that they were subsequent to the measures at issue meant that they could not be cited in support of the argument that the Spanish

Government had failed to hold a technologically neutral call for tenders. The Commission added that the results of those studies were contradicted by the cost estimates submitted by the operator referred to in paragraph 13 above, which demonstrated that satellite technology was more cost-effective.

148 As already established (see paragraph 124 above), it follows from recital 158 of the contested decision that the Commission rejected the studies submitted by a telecommunications infrastructures operator/network equipment supplier, without ruling on their independence and reliability, because they were subsequent to the measures at issue and contradicted by the cost estimates submitted by the operator referred to in paragraph 13 above. Contrary to the Spanish authorities' assertions, the Commission did not favour the study submitted by that operator over those submitted by the exploiter. Rather, it merely presented the content of that operator's study, which found that satellite technology was more cost-effective, which contradicted the results of the studies submitted by that telecommunications infrastructures operator/network equipment supplier. That conclusion is confirmed by the fact that it follows from recital 154 of that decision that, according to the Commission, the choice of a particular technology could have been accepted if it had been justified by findings of an *ex-ante* study proving that, in terms of quality and cost, only one technological solution could have been selected. Contrary to the Kingdom of Spain's contention, the Commission therefore did not consider that that operator's study was valid or that it showed that the satellite solution was better. Its objective was to examine whether, owing to failure to comply with the principle of technological neutrality, the measures at issue could be justified by an *ex-ante* study choosing a single technological solution. Recital 158 of the contested decision therefore does not permit the conclusion that the Community lacked objectivity and impartiality.

149 Second, as regards recital 164 of the contested decision, the Kingdom of Spain asserts that the Commission accepted the estimates of the operator referred to in paragraph 13 above relating to the number of regional channels, instead of taking account of the official figures supplied by the Autonomous Communities. That argument must be rejected. In that recital, the Commission merely stated that, according to that operator, the number of 1 380 regional channels put forward by the Spanish authorities was hugely exaggerated. On the other hand, it did not find that the number of regional channels estimated by that operator, namely 415 according to footnote 93 of that decision, was correct. In taking the view, in that recital, that the Spanish authorities had not substantiated their argument that satellite technology was not equipped to broadcast a large number of regional channels, the Commission merely applied the rule relating to the burden of proof stated in recital 154 of the contested decision, from which it follows that it was for the Kingdom of Spain to establish that, in terms of quality and cost, it was not possible to choose only a single technological solution.

150 Third, as regards recital 166 of the contested decision, the Kingdom of Spain claims that the Commission accepted the argument of the operator referred to in paragraph 13 above that the satellite solution was more economical than DTT and considered that, because there had been no call for tenders at national level, the amount of the aid had been increased. In addition, in taking the view in that recital that the Spanish Government could have encouraged the Autonomous Communities to take possible cost-saving efficiencies into account in their calls for tenders, the Commission considered that those Autonomous Communities ought to have launched calls for tenders specifically adapted to satellite technology.

151 That argument does not show that the Commission failed to fulfil its obligation to act with objectivity and impartiality. Contrary to the Kingdom of Spain's assertion, it does not follow from recital 166 of the contested decision that the Commission considered that the satellite solution was more economical than DTT. In that recital, the Commission examined the proportionality of the measure at issue and referred to certain specific features of the satellite solution, which could have been taken into consideration by the Spanish authorities when deciding what was the best technological solution in terms of quality and cost. Thus, the Commission emphasized the possible price reductions that would have been obtained with the satellite solution if a call for tenders had been launched at national level. Likewise, it pointed out that the Spanish Government could have encouraged the Autonomous

Communities to launch calls for tenders that took into account possible cost-saving efficiencies available from particular platforms. In highlighting those various factors, the Commission did not in any way favour the satellite solution.

152 Fourth, as regards recitals 162 and 163 of the contested decision, the Kingdom of Spain claims that the Commission was wrong to accept the arguments of the operator referred to in paragraph 13 above relating to the inclusion of the costs associated with the digital dividend and 4G mobile frequencies LTE. It submits that the Spanish authorities could not have foreseen those costs when planning the transition from analogue terrestrial television to DTT and that the Commission assessed the appropriateness of a measure implemented in 2009 and 2010 on the basis of events that occurred in 2011 and 2012.

153 In that regard, it should be observed that, in recitals 162 and 163 of the contested decision, the Commission considered that the appropriateness of the terrestrial solution would continue to be disputed owing to the costs associated with the digital dividend and would be called into question in the future owing to the costs associated with 4G mobile frequencies. It should be stated that those views were expressed after the Commission concluded in recital 159 of that decision, that the measure at issue could not be considered appropriate. As the factual elements that led the Commission to refer to the fact that those costs would arise have not been challenged by the Kingdom of Spain, it cannot be concluded that the Commission failed to fulfil its obligation to act with objectivity and impartiality in those recitals.

154 The fourth complaint and, accordingly, the third plea in its entirety must therefore be rejected.

Fourth plea, alleging, in the alternative, breach of the principles of legal certainty, equal treatment, proportionality and subsidiarity, in relation to the demand for recovery of the aid

155 The Kingdom of Spain claims, in the alternative, with reference to Article 14 of Regulation No 659/1999, that recovery of the aid in question runs counter to the general principles of EU law, namely the principles of legal certainty, equal treatment, proportionality and subsidiarity.

First part, alleging breach of the principle of legal certainty

156 The Kingdom of Spain asserts, first, that the contested decision breaches the principle of legal certainty, because it faces serious difficulties in calculating the precise amount of the sums to be repaid. It considers that it must first of all determine whether each of the 516 calls for tenders organised by the regions was technologically neutral. In addition, since each Autonomous Community implemented its own action programmes, it is difficult to determine the sums that would not have to be repaid, especially in the case of public supply contracts and *de minimis* aid. Furthermore, there are mixed supply and services contracts the principal nature of which must be determined and contracts exclusively concerned with maintenance that could be assimilated to the category of contract of supply. It is also necessary to have specific figures relating to the sums paid in the Autonomous Communities. The contested decision does not define either the recipients concerned or the amount to be repaid. Second, the Kingdom of Spain claims that the contested decision breaches the principle of legal certainty, because the decision to initiate the procedure forms part of it. Third, in its submission, there has been a breach of the principle of legal certainty because the Commission transferred to the Kingdom of Spain the burden of proving the part of the aid that should not be repaid because, as *de minimis* aid, it is compatible with the internal market pursuant to Article 2 of Council Regulation (EC) No 994/1998 of 7 May 1998 on the application of Articles [107 TFEU] and [108 TFEU] to certain categories of horizontal State aid (OJ 1998 L 142, p. 1).

157 In that regard, it should be borne in mind that the principle of legal certainty, which is one of the general principles of EU law, requires that rules of law be clear and precise and predictable in their effect, so that interested parties can ascertain their position in situations and legal relationships governed by the legal order of the European Union (see judgment of 8 December 2011 in *France Télécom* v *Commission*, C-81/10 P, ECR, EU:C:2011:811, paragraph 100 and the case-law cited).

158 It should be observed that a Member State whose authorities have granted aid contrary to the procedural rules laid down in Article 108 TFEU may not rely on the principle of legal certainty in order to justify a failure to comply with the obligation to take the steps necessary to implement a Commission decision instructing it to recover the aid (judgment of 14 September 1994 in *Spain* v *Commission*, C-278/92 to C-280/92, ECR, EU:C:1994:325, paragraph 76).

159 In the present case the Kingdom of Spain has not put forward any argument that would permit a derogation from that rule.

160 First, as regards the alleged lack of details concerning the breakdown of the aid to be recovered, it must be borne in mind that, where compliance with decisions relating to aid schemes is concerned, it is for the authorities of the Member State involved to verify the individual situation of each undertaking concerned, since those authorities are in the best position to determine the exact amounts to be repaid. It follows that the Commission may leave it to the national authorities to calculate the exact amount of the sums to be recovered (see judgment of 13 May 2014 in *Commission* v *Spain*, C-184/11, ECR, EU:C:2014:316, paragraph 22 and the case-law cited). No provision of EU law requires the Commission, when ordering the recovery of aid declared incompatible with the internal market, to fix the exact amount of the aid to be recovered. It is sufficient for the Commission's decision to include information enabling the addressee to work out for itself, without overmuch difficulty, that amount (see judgment of 12 May 2005 in *Commission* v *Greece*, C-415/03, ECR, EU:C:2005:287, paragraph 39 and the case-law cited). In the present case, as the calls for tenders were classified in recitals 183 to 188 of the contested decision and the Commission established various categories of beneficiaries of the aid in recitals 189 to 197 of that decision, no argument put forward by the Kingdom of Spain permits the conclusion that it may encounter difficulties in determining the amount to be repaid.

161 Second, as regards the argument that the contested decision does not define the beneficiaries concerned, it should be pointed out that, read in conjunction with recitals 100 to 112 of that decision, recital 182 provides sufficient information for the Kingdom of Spain to be able to determine the beneficiaries of the aid at issue. According to that recital, platform operators are direct beneficiaries where they directly receive funds for the upgrading and extension of their networks and/or for operation and maintenance. In addition, where the aid was paid to public undertakings which subsequently organised calls for tenders for the extension of coverage, the selected platform operator is considered to be the indirect beneficiary. As the Kingdom of Spain has adduced no evidence to support the view that, in the light of the information thus provided in the contested decision, it will find it exceedingly difficult to determine the beneficiaries of the aid at issue, its argument must be rejected.

162 Furthermore, it must be borne in mind that, if the Spanish authorities had serious doubts in that respect, they could, like any Member State which encounters unforeseen difficulties in implementing an order for recovery, submit those problems for consideration by the Commission, with a view to overcoming them in accordance with the principle of genuine cooperation while fully observing the Treaty provisions on aid (judgments of 13 June 2002 in *Netherlands* v *Commission*, C-382/99, ECR, EU:C:2002:363, paragraph 92, and in *Commission* v *Spain*, cited in paragraph 160 above, EU:C:2014:316, paragraph 66). Where a Commission decision has ordered recovery of the aid, any procedural or other difficulties in regard to the implementation of that decision cannot affect its lawfulness (see judgment of 1 July 2009 in *KG Holding and Others* v *Commission*, T-81/07 to T-83/07, ECR, EU:T:2009:237, paragraph 200 and the case-law cited).

163 Third, as regards the argument that the situation in Spain is complex on account of the different programmes launched by the Autonomous Communities, it must be borne in mind that when the Commission is faced with an aid scheme such as that in the present case, it is generally not in a position — nor is it required — to identify exactly the amount of aid received by each of the individual beneficiaries. Accordingly, the specific circumstances of one of the beneficiaries of an aid scheme can be assessed only at the stage of recovery of the aid (see judgment of 31 May 2006 in *Kuwait Petroleum (Nederland)* v *Commission*, T-354/99, ECR, EU:T:2006:137, paragraph 67 and the case-law cited).

164 Fourth, as regards the argument that the Commission required the Kingdom of Spain to prove the part of the aid that was not to be recovered, because it was compatible with the internal market under Article 2 of Regulation No 994/1998, it should be observed that the circumstances in which a measure may be regarded as *de minimis* aid are defined in Commission Regulation (EC) No 1998/2006 on the application of Articles [107 TFEU] and [108 TFEU] to *de minimis* aid (OJ 2006 L 379, p. 5). It is for the Member State, during the recovery phase, to provide all the information necessary to enable it to be determined in which cases recovery did not take place because the *de minimis* aid conditions were satisfied.

165 Fifth, in so far as the Kingdom of Spain claims, generally, without providing any detail in that respect, that the fact that the Commission incorporated the decision to initiate the procedure in the contested decision breaches the principle of legal certainty with regard to the recovery of the aid at issue, its argument must also be rejected. It is true that the Commission stated in recital 41 of the contested decision that the decision to initiate the procedure was an integral part of the contested decision. However, while the incorporation in the contested decision of all the reasoning set out in the decision to initiate the procedure, which is of a preliminary nature, cannot readily be reconciled with the definitive nature of the Commission's assessment set out in the contested decision, the fact nonetheless remains that the decision to initiate the procedure contains no reasoning relating to the recovery of the aid at issue.

166 Consequently, the first part of the present plea must be rejected.

Second part, alleging breach of the principle of equal treatment

167 The Kingdom of Spain claims that if, pursuant to Article 3(4) of the contested decision, current payments are cancelled, it will not be possible to require network operators to continue the operation and maintenance of the network in Area II, which would lead to the interruption of the television signal in that area. The interruption of the signal would affect, in particular, disadvantaged groups, such as those consisting of the elderly and those on low incomes, which would breach the principle of equal treatment. Access to television channels via other networks would be impossible for those persons owing to the costs of the necessary investments.

168 According to settled case-law, the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see judgment of 14 September 2010 in *Akzo Nobel Chemicals and Akcros Chemicals v Commission and Others*, C-550/07 P, ECR, EU:C:2010:512, paragraph 55 and the case-law cited).

169 In the present case the Commission has not breached that principle. In considering that the aid granted to terrestrial television platform operators for the deployment, maintenance and operation of the DTT network in Area II, which was implemented unlawfully, was incompatible with the internal market, apart from the aid granted in accordance with the principle of technological neutrality, and in demanding recovery of that aid, under the contested decision, the Commission neither treated comparable situations differently nor treated different situations in the same way.

170 In that regard, it should also be borne in mind that, according to settled case-law, the principle of equal treatment must be reconciled with the principle of legality, which assumes that a person may not rely, in support of his claim, on an unlawful act committed in favour of a third party (see judgment of 10 November 2011 in *The Rank Group*, C-259/10 and C-260/10, ECR, EU:C:2011:719, paragraph 62 and the case-law cited).

171 In addition, it should be observed that, as the Commission asserts, no evidence adduced by the Kingdom of Spain shows that the contested decision, in that it orders recovery of the State aid at issue and cancellation of current payments, leads to an effective interruption of the DTT service throughout Area II and thus deprives the inhabitants concerned of the exercise of their fundamental right to televised information. The Kingdom of Spain has not provided sufficient detail concerning the number, identity, status and financial strength of the various terrestrial television platform operators affected by the recovery measures at issue and has not deemed it necessary to describe, as an example and by way of illustration, the situation of a single operator, or the amount to be repaid or which would be necessary in order to maintain the management and maintenance services of the broadcasting centres concerned. In those circumstances, the Kingdom of Spain's assertions relating to an interruption of the television service in Area II if the aid at issue were to be recovered must be classified as unsubstantiated assumptions.

172 Furthermore, it should be remembered that the contested decision does not affect the obligation to provide coverage for virtually the whole of Area II as regards the public channels (see paragraph 46 above) and that it is for the Kingdom of Spain to organise the extension of the digital television network in accordance with EU law on State aid.

173 The second part of the plea must therefore be rejected.

Third part, alleging breach of the principle of proportionality

174 The Kingdom of Spain claims that the contested decision breaches the principle of proportionality because it leads to the interruption of the television signal in Area II and because the operators of other technologies are not interested in participating in calls for tenders. It maintains that that lack of interest is due, as regards the calls for tenders which the Commission regards as not technologically neutral, to the small advantage which results from the territorial limitation. That limitation is the consequence of the allocation of powers between the different levels of the Spanish administration. The lack of interest also became apparent when technologically neutral calls for tenders were launched in the Canary Islands, where no tender was submitted by satellite operators. Consequently, by repaying the aid, the beneficiaries would not lose the advantage which they enjoyed on the market by comparison with their competitors, since they would almost certainly have obtained that advantage by being successful in the context of neutral calls for tenders. Non-recovery of the aid at issue would therefore cause no harm to operators of platforms other than DTT.

175 It should be borne in mind that the principle of proportionality requires that measures adopted by the EU institutions must not exceed what is appropriate and necessary to attain the objective pursued; where there is a choice between several methods, the least onerous method must be employed (see judgments of 17 May 1984 in *Denkavit Nederland*, 15/83, ECR, EU:C:1984:183, paragraph 25 and the case-law cited, and of 9 September 2009 in *Diputación Foral de Álava and Others*, T-230/01 to T-232/01 and T-267/01 to T-269/01, EU:T:2009:316, paragraph 376 and the case-law cited).

176 According to the case-law, the cancellation of unlawful aid through recovery is the logical consequence of the finding that it is unlawful, so that the recovery of that aid, with a view to restoring the previous situation, cannot in principle be regarded as a disproportionate measure by reference to the objectives of the Treaty provisions on State aid (see judgment of 28 July 2011 in *Diputación Foral de Vizcaya* v *Commission*, C-471/09 P to C-473/09 P, EU:C:2011:521, paragraph 100 and the case-law cited).

177 In the present case the Kingdom of Spain has not put forward any argument that would permit a derogation from those rules.

178 First, in so far as the Kingdom of Spain claims that the contested decision leads to the interruption of the television signal in Area II, it is sufficient to point out that argument has already been rejected (see paragraphs 171 and 172 above). In the context of this part of the plea, it should be added that the contested decision does not require the Kingdom of Spain to recover all the resources granted or to cancel all payments in that regard; it is required only to recover the aid at issue and to cancel all the payments at issue, in so far as the principle of technological neutrality was not observed and the measure at issue cannot be considered to be *de minimis* aid.

179 Second, as regards the argument that, because operators of platforms other than DTT had no interest in participating in calls for tenders in Area II, the beneficiaries would not lose their advantage, it is sufficient to point out that, even according to the Kingdom of Spain, such a consequence is not certain and is purely hypothetical.

180 The third part of the plea must therefore be rejected.

Fourth part, alleging breach of the principle of subsidiarity

181 The Kingdom of Spain claims that the Commission has breached the principle of subsidiarity by seeking to impose a specific audiovisual model in the contested decision, which, however, is a matter for the Member States.

182 That argument cannot be upheld. Since the assessment of the compatibility of aid with the internal market falls within the exclusive competence of the Commission, subject to review by the Courts of the European Union, the Commission cannot have breached the principle of subsidiarity (see, to that effect, judgment in *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle* v *Commission*, cited in paragraph 35 above, EU:C:2012:821, paragraph 79 and the case-law cited). Pursuant to Article 5(3) TEU, that principle applies only in areas which do not fall within the exclusive competence of the European Union.

183 The fourth part of the present plea and, accordingly, this plea in its entirety must therefore be rejected.

Fifth plea, alleging, in the alternative, breach of the fundamental right to receive information relating to the demand for recovery of the aid

184 The Kingdom of Spain claims, in the alternative, that cancellation of all current payments under the alleged aid scheme at issue would deprive 1.2 million inhabitants of any possibility of access to a television channel and prevent them from exercising their right to receive information, as provided for in Article 11 of the Charter of Fundamental Rights of the European Union. It maintains that the breach of that right is neither justified nor proportionate.

185 In that regard, it is sufficient to observe that the Kingdom of Spain's argument that the contested decision results in the interruption of the television signal in Area II had already been rejected when the Court examined the second part of the fourth plea (see paragraphs 171 and 172 above). In ordering cancellation of all payments, under Article 3(4) of that decision, the Commission therefore did not breach the right to receive information provided for in Article 11 of the Charter of Fundamental Rights.

186 It follows that the fifth plea must be rejected and that, accordingly, the action must be dismissed in its entirety.

Costs

187 Under Article 134(1) of the Rules of Procedure of the General Court, 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 Kingdom of Spain has been unsuccessful, it must be ordered to pay the costs relating to the main proceedings and to the proceedings for interim relief, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders the Kingdom of Spain to pay the costs relating to the main proceedings and to the proceedings for interim relief.**

Dittrich Schwarcz Tomljenović

Delivered in open court in Luxembourg on 26 November 2015.

[Signatures]

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