Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

20 September 2018 *

(Appeal — State aid — Digital television — Aid for the deployment of digital terrestrial television in remote and less urbanised areas of the Comunidad Autónoma de Castilla-La Mancha (Autonomous Community of Castilla-La Mancha, Spain) — Subsidies granted to operators of digital terrestrial television platforms — Decision declaring the aid incompatible in part with the internal market — Concept of 'State aid' — Advantage — Service of general economic interest — Definition — Discretion of the Member States)

In Case C-114/17 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 3 March 2017,

Kingdom of Spain, represented by M.J. García-Valdecasas Dorrego, acting as Agent,

appellant,

the other party to the proceedings being:

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

defendant at first instance.

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Chamber, C. Vajda, E. Juhász, K. Jürimäe (Rapporteur) and C. Lycourgos, Judges,

Advocate General: E. Sharpston,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 7 March 2018,

after hearing the Opinion of the Advocate General at the sitting on 8 May 2018,

gives the following

* Language of the case: Spanish.

Judgment

1 By its appeal, the Kingdom of Spain seeks to have set aside the judgment of the General Court of the European Union of 15 December 2016, *Spain* v *Commission* (T-808/14, not published, EU:T:2016:734; 'the judgment under appeal'), by which the General Court dismissed its action for annulment of Commission Decision C(2014) 6846 final of 1 October 2014 on State aid SA.27408 ((C 24/10) (ex NN 37/10, ex CP 19/09)) granted to the authorities of Castilla-La Mancha for the deployment of digital terrestrial television in remote and less urbanised areas.

Legal context

2 Article 84 of the Rules of Procedure of the General Court, in the version applicable to the proceedings which led to the judgment under appeal ('the Rules of Procedure of the General Court'), entitled 'New pleas in law', provides:

'1. No new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

2. Any new pleas in law shall be introduced in the second exchange of pleadings and identified as such. Where the matters of law or of fact justifying the introduction of new pleas in law are known after the second exchange of pleadings or after it has been decided not to authorise a second exchange of pleadings, the main party concerned shall introduce the new pleas in law as soon as those matters come to his knowledge.

3. Without prejudice to the decision to be taken by the General Court on the admissibility of the new pleas in law, the President shall give the other parties an opportunity to respond to those pleas.'

3 Article 86 of those rules, entitled 'Modification of the application', provides:

'1. Where a measure the annulment of which is sought is replaced or amended by another measure with the same subject matter, the applicant may, before the oral part of the procedure is closed, or before the decision of the General Court to rule without an oral part of the procedure, modify the application to take account of that new factor.

2. The modification of the application must be made by a separate document within the time limit laid down in the sixth paragraph of Article 263 TFEU within which the annulment of the measure justifying the modification of the application may be sought.

…

4. The statement of modification shall contain:

(a) the modified form of order sought;

(b) where appropriate, the modified pleas in law and arguments;

(c) where appropriate, the evidence produced and offered in connection with the modification of the form of order sought.

5. The statement of modification must be accompanied by the measure justifying the modification of the application. If that measure is not produced, the Registrar shall prescribe a reasonable time limit within which the applicant is to produce it. If the applicant fails to produce the measure within the time limit prescribed, the General Court shall decide whether the non-compliance with that requirement renders the statement modifying the application inadmissible.

6. Without prejudice to the decision to be taken by the General Court on the admissibility of the statement modifying the application, the President shall prescribe a time limit within which the defendant may respond to the statement of modification.

…'

Background to the dispute

4 The factual background to the dispute was set out by the General Court in paragraphs 1 to 24 of the judgment under appeal. For the purposes of the present proceedings, they may be summarised as follows.

5 The present case concerns a series of measures implemented by the Spanish authorities in relation to the switch-over from analogue broadcasting to digital broadcasting throughout Spain, in the Comunidad Autónoma de Castilla-La Mancha (Autonomous Community of Castilla-La Mancha, Spain) ('the measure at issue').

6 The Kingdom of Spain established a regulatory framework 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 television and support of pluralism) of 14 June 2005 (BOE No 142 of 15 June 2005, p. 20562) 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). Under that Royal Decree, private and public national broadcasters were required to ensure that 96% and 98% of the population, respectively, would receive digital terrestrial television ('DTT').

7 In order to enable the switch-over from analogue television to DTT, the Spanish authorities divided the Spanish territory into three separate areas: 'Area I', 'Area II' and 'Area III'. Area II, the area at issue in the present proceedings, includes remote and less urbanised regions representing 2.5% of the Spanish population. In that area, due to a lack of commercial interest, broadcasters did not invest in digitisation, which led the Spanish authorities to put public funding in place.

8 In September 2007, the Consejo de Ministros (Council of Ministers, Spain) adopted a national plan for the transition to DTT, the objective of which was to achieve a rate of coverage of the Spanish population by DTT comparable to the rate of coverage of that population by analogue television in 2007, that is to say, more than 98% of that population and 99.96% of the population in the Autonomous Community of Castilla-La Mancha.

9 In order to achieve the coverage objectives set for DTT, the Spanish authorities made provision for the grant of public funding, in order, inter alia, to support the terrestrial digitisation process in Area II and, more particularly, in those parts of the Autonomous Community of Castilla-La Mancha covered by that area.

10 In February 2008, the Ministerio de Industria, Turismo y Comercio (the Ministry of Industry, Tourism and Trade, Spain; 'the MITT') adopted a decision intended to improve the telecommunications infrastructures and establish the criteria and distribution of the funding for the actions to develop 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.

11 That digitisation was carried out between July and November 2008. The MITT subsequently transferred funds to the Autonomous Communities, which undertook to fund the remaining costs of the operation from their own budgets.

12 In October 2008, the Council of Ministers decided to allocate additional funding in order to extend and complete DTT coverage within the context of the digital switch-over projects scheduled to be implemented during the first half of 2009.

13 The Autonomous Communities subsequently began the process of extending DTT coverage. In order to do so, they organised calls for tenders or entrusted that extension to private undertakings. In some cases, the Autonomous Communities asked the municipal authorities to implement that extension.

14 Unlike the majority of other Autonomous Communities in Spain, the Autonomous Community of Castilla-La Mancha did not organise calls for tenders for the extension of digital television coverage. The authorities in that Autonomous Community followed a special procedure, established by Decreto 347/2008 por el que se regula la concesión de subvenciones directas para la ejecución del plan de transición a la televisión digital terrestre en Castilla-La Mancha (Decree 347/2008 on rules for the grant of direct subsidies for the implementation of the terrestrial television digitisation programme in Castilla-La Mancha), of 2 December 2008 (*Diario oficial de Castilla-La Mancha* No 250, of 5 December 2008, p. 38834).

15 Decree 347/2008 provided for the direct attribution of the funds necessary for the digitisation to the owners of the existing transmission centres. Where the transmission centres were owned by a local authority, it is that authority which concluded an agreement with the Government of Castilla-La Mancha in order to obtain the funding for those centres. The local authorities subsequently purchased the digital equipment for their telecommunications operator and subcontracted the installation, operation and maintenance of the equipment to that operator. Where the transmission centres were owned by a private telecommunications operator, that operator concluded an agreement with that government in order to obtain the necessary funding for the digitisation of the equipment. In so far as it was necessary to build 20 new transmission centres, 14 were built on the basis of agreements concluded between the government of Castilla-La Mancha and local authorities, while 6 were built on the basis of agreements concluded between that government and a telecommunications operator.

16 The Government of Castilla-La Mancha financed the acquisition of digital equipment, its installation, and the operation and maintenance thereof for the first two years, for each of the digitised transmission centres. Thus 475 transmission centres were held by local authorities, while 141 were financed by funds allocated to two telecommunications operators, namely Telecom CLM and Abertis Telecom Terrestre SA ('Abertis').

17 On 14 January and 18 May 2009, the European Commission received two complaints lodged by (i) Radiodifusión Digital SL, a local telecommunications and terrestrial television operator; and (ii) SES Astra SA. Those complaints concerned a State aid scheme implemented by the Spanish authorities in relation to the switch-over from analogue television to DTT in Area II. According to the complainants, that scheme constituted non-notified aid liable to distort competition between the terrestrial and satellite broadcasting platforms. Furthermore, Radiodifusión Digital claimed that the measure at issue distorted competition between national and local operators.

18 By letter of 29 September 2010, the Commission informed the Kingdom of Spain of its decision to initiate the procedure laid down in Article 108(2) TFEU with regard to the scheme at issue in the Autonomous Community of Castilla-La Mancha. On the same date, the Commission informed that Member State that a separate procedure had been initiated concerning that aid scheme in respect of the Spanish territory as a whole, with the exception of the Autonomous Community of Castilla-La Mancha (OJ 2010 C 337, p. 17).

19 On 19 June 2013, the Commission adopted Decision 2014/489/EU on State aid SA.28599 ((C 23/10 (ex NN 36/10, ex CP 163/09)) implemented by the Kingdom of Spain for the deployment of digital terrestrial television in remote and less urbanised areas (outside Castilla-La Mancha) (OJ 2014 L 217, p. 52).

20 The Commission subsequently adopted Decision C(2014) 6846 final, Article 1 of which states, in its first subparagraph, that the State aid granted to the terrestrial television platform operators Telecom CLM and Abertis to upgrade their transmission centres, build new transmission centres, and to supply, operate and maintain digital services in Area II of the Autonomous Community of Castilla-La Mancha, had been implemented in breach of the provisions of Article 108(3) [TFEU] and was incompatible with the internal market. The second subparagraph of Article 1 of that decision declares the State aid granted for installing satellite receivers, for the purposes of broadcasting Hispasat SA's signals in that area, unlawful and incompatible.

21 Under Article 3(1) of Decision C(2014) 6846 final, the Commission ordered the Kingdom of Spain to recover the incompatible aid granted on the basis of the measure at issue from Telecom CLM, Abertis and Hispasat.

22 In the grounds of that decision, the Commission took the view, in the first place, that the various acts adopted at the central level and the agreements concluded 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.

23 In the second place, the Commission found that the measure at issue had to be regarded as State aid within the meaning of Article 107(1) TFEU. According to that institution, Abertis and Telecom CLM are the direct beneficiaries of the aid concerned, inasmuch as they benefited from an economic advantage in receiving public funds to digitise their own equipment or build new transmission centres. Where local authorities acted as network operators, they also benefited directly from that aid. The advantage of that measure was selective, in the Commission's view, as it concerned only those undertakings which were active on the terrestrial platform market and network operators were selected not on the basis of a call for tenders, but rather on that of a specific procedure. The direct selection of the beneficiaries led to the exclusion of any other potential competitor offering terrestrial technology. Taking account of the fact that the satellite and terrestrial platforms are in competition, the measure at issue distorted competition between those two platforms.

24 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 the fact that that measure was intended to achieve a well-defined objective in the public interest and that there was a market failure on the market concerned. According to the Commission, since that measure failed to comply the principle of technological neutrality, it was not proportionate and was not an appropriate instrument for ensuring that the residents of Area II in the Autonomous Community of Castilla-La Mancha received free-to-air channels.

25 In the fourth place, the Commission considered that, since the operation of a terrestrial platform as a public service and the measure awarding that public service to a specific platform operator had not been defined sufficiently clearly, the measure at issue could not be justified under Article 106(2) TFEU.

The procedure before the General Court and the judgment under appeal

26 By application lodged at the Registry of the General Court on 12 December 2014, the Kingdom of Spain brought an action seeking the annulment of Decision C(2014) 6846 final.

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

28 The Commission adopted Decision C(2015) 7193 final of 20 October 2015, in order to correct errors contained in Decision C(2014) 6846 final concerning Hispasat. Further to that correction, in the first subparagraph of Article 1 of Decision C(2014) 6846 final, the words 'supply of [digital] services' were replaced by the words 'supply of [digital] equipment'. Moreover, the Commission removed the second subparagraph of Article 1 of Decision C(2014) 6846 and amended Article 3(1) of that decision. It abandoned its finding as to the existence of unlawful and incompatible State aid granted for installing satellite receivers for the purposes of broadcasting Hispasat signals in Area II of the Autonomous Community of Castilla-La Mancha, which aid was to be recovered from that operator by the Member State concerned.

29 By letter lodged with the General Court on 23 December 2015, the Kingdom of Spain stated that it was putting forward a new plea following the amendment to the first subparagraph of Article 1 of Decision C(2014) 6846 by Decision C(2015) 7193, in accordance with Article 84 of the Rules of Procedure of the General Court. The Commission forwarded its observations concerning that letter on 28 January 2016.

30 In the judgment under appeal, the General Court, having declared the new plea in law to be admissible, rejected it as being unfounded. It also rejected the five pleas in law raised by the Kingdom of Spain in the action for annulment of 12 December 2014.

Forms of order sought by the parties

31 By its appeal, the Kingdom of Spain asks the Court to:

– set aside the judgment under appeal;

– annul Decision C(2014) 6846 final; and

– order the Commission to pay the costs;

32 The Commission asks the Court to dismiss the appeal and order the Kingdom of Spain to pay the costs.

The appeal

33 The Kingdom of Spain relies on three grounds in support of its appeal.

34 At the hearing before the Court, the Kingdom of Spain submitted a new ground of appeal, on the basis of Article 127 of the Rules of Procedure of the Court of Justice.

Admissibility of the new ground of appeal submitted at the hearing

35 By its new ground of appeal, submitted at the hearing, the Kingdom of Spain submits, in essence, that the General Court erred in law by failing to assess, of its own motion, the failure to state reasons in Decision C(2014) 6846 final in relation to the selective nature of the measure at issue.

36 The Kingdom of Spain bases that new ground of appeal on the judgment of 20 December 2017, *Comunidad Autónoma de Galicia et Retegal* v *Commission* (C-70/16 P, EU:C:2017:1002), and takes the view that that judgment constitutes a matter of law which came to light in the course of the procedure, within the meaning of Article 127 of the Rules of Procedure of the Court, thereby justifying the submission of that ground of appeal in the course of the proceedings.

37 The Commission contends that that new ground of appeal is inadmissible.

38 It should be recalled that, under Article 127(1) of the Rules of Procedure of the Court, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which have come to light in the course of the procedure.

39 In the present case, the judgment of 20 December 2017, *Comunidad Autónoma de Galicia et Retegal* v *Commission* (C-70/16 P, EU:C:2017:1002), cannot be considered as a matter of law which came to light in the course of the procedure. It is apparent, in particular from paragraphs 59 and 61, that the judgment merely confirms the requirements concerning the statement of reasons for the examination of the condition relative to the selectivity of an aid measure, arising from the judgments of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971), and *Commission* v *World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981), delivered before this appeal was brought by the Kingdom of Spain. A judgment which merely confirms a legal position known to the appellant at the time when an appeal is brought cannot be considered as a matter allowing a new ground of appeal to be submitted.

40 Consequently, the new ground of appeal submitted by the Kingdom of Spain must be rejected as inadmissible.

The first ground of appeal

Arguments of the parties

41 By its first ground of appeal, the Kingdom of Spain submits that paragraph 48 of the judgment under appeal is vitiated by an error in law, in so far as, in that paragraph, the General Court stated that Decision C(2015) 7193 did not give rise to any new obligation for that Member State. It is submitted that that assessment is contrary to Article 1 of Decision C(2014) 6846 final prior to its amendment and involves an error in law in the light of the principles of good administration and legal certainty, as well as the concept of State aid, for the purposes of Article 107 TFEU.

42 In the first place, the Kingdom of Spain takes the view that the General Court erred in law inasmuch as Decision C(2015) 7193 final involves a substantive amendment to Decision C(2014) 6846 final, in such a way that the General Court ought to have found that Decision C(2015) 7193 final did indeed give rise to a new obligation for the Kingdom of Spain.

43 In that connection, that Member State submits that the elements on which the General Court relied did not lead to the conclusion which it reached. First of all, from a terminological perspective, the 'supply of digital equipment' does not come within the scope either of 'upgrading transmission centres' or 'building new transmission centres'. Secondly, in so far as the concept of 'supply of digital equipment' was not defined in Decision C(2014) 6846 final, it is impossible to quantify the advantage allegedly received on that basis by the operators concerned. Lastly, that finding is not apparent from Recital 197 of that decision.

44 In the second place, the Kingdom of Spain takes the view that the General Court in finding that the amendment at issue did not give rise to a new obligation for that Member State, disregarded the principles of good administration and legal certainty. It is submitted that the General Court ought to have found that the Commission was required to respect the right of that Member State to submit observations prior to the adoption of Decision C(2015) 7193 final, given that the Commission had amended the description of the measure at issue and that the amount to be recovered rose from EUR 11.3 to 43.8 million. Furthermore, contrary to the rule of parallelism of procedural requirements recalled in paragraph 45 of the judgment under appeal, the Commission failed to adopt Decision C(2015) 7193 final in accordance with the same formal rules as those followed for the adoption of Decision C(2014) 6846 final.

45 In the third place, the Kingdom of Spain submits that that amendment seriously infringed the very substance of the measure at issue, classed as 'State aid', within the meaning of Article 107 TFEU.

46 The Commission contends that that ground of appeal is ineffective, given that it cannot lead to the judgment under appeal being set aside. At most, that ground of appeal may lead to the annulment of Decision C(2015) 7193 final, which would leave intact Decision C(2014) 6846 final in its initial version.

Findings of the Court

47 In accordance with Article 170(1) of the Rules of Procedure of the Court of Justice, the subject matter of the proceedings before the General Court may not be changed in the appeal.

48 Questions relating to the admissibility of the action for annulment brought before the General Court must be raised by the Court of Justice by its own motion (see, by analogy, judgment of 29 November 2007, *Stadtwerke Schwäbisch Hall and Others* v *Commission*, C-176/06 P, not published, EU:C:2007:730, paragraph 18). In any case, the parties were invited to submit their observations on that question, which was raised by the Court of its own motion.

49 The Court has already ruled that the examination relating to compliance with Article 170(1) of the Rules of Procedure of the Court requires an assessment of the scope of the submissions made at first instance and the subject matter of the proceedings before the General Court (see, to that effect, judgment of 14 November 2017, *British Airways* v *Commission*, C-122/16 P, EU:C:2017:861, paragraph 54).

50 In so far as, in its application initiating proceedings before the General Court, the Kingdom of Spain sought the annulment of Decision C(2014) 6846 final and that Decision C(2015) 7193 final was adopted subsequent to that application, it is necessary to determine whether that Member State also sought the annulment of Decision C(2015) 7193 final by means of the amendment of its application initiating proceedings.

51 In paragraph 36 of the judgment under appeal, the General Court noted that, by the new plea in law, introduced on the basis of Article 84 of the Rules of Procedure of the General Court, the Kingdom of Spain contested the actual amendment of Decision C(2014) 6846 final by Decision C(2015) 7193 final.

At the hearing before the General Court, the Kingdom of Spain stated that, by introducing its new plea in law before the General Court, that Member State had sought to adapt the forms of order sought in its action for annulment of Decision C(2014) 6846 so as to extend the scope of that action to the annulment of that decision as amended by Decision C(2015) 7193 final.

52 It is settled case law of the Court of Justice that the forms of order sought by the parties may not, in principle, be altered. Article 86 of the Rules of Procedure of the General Court, on the modification of the application initiating proceedings, is a codification of pre-existing case-law on the admissible exceptions to the principle that the forms of order sought by the parties are unalterable (judgment of 9 November 2017, *HX* v *Council*, C-423/16 P, EU:C:2017:848, paragraph 18 and the case-law cited).

53 Article 86 provides that, where a measure the annulment of which is sought is replaced or amended by another measure with the same subject matter, the applicant may, before the oral part of the procedure is closed, or before the decision of the General Court to rule without an oral part of the procedure, modify the application to take account of that new factor.

54 As an exception to the principle of unalterability of proceedings, Article 86 must, accordingly, be interpreted strictly.

55 In the present case, it is clear from paragraph 33 of the judgment under appeal that, following the adoption of Decision C(2015) 7193 final, the Kingdom of Spain introduced a new plea in law, on the basis of Article 84(1) of the Rules of Procedure of the General Court. However, it is common ground that that Member State did not apply to modify its application on the basis of Article 86 of those Rules of Procedure.

56 As the Advocate General emphasises in point 42 of her Opinion, while Article 84 of those Rules of Procedure allows the applicant only to introduce new pleas in law, by contrast Article 86 thereof allows that party to modify the subject matter of the application, that is to say, to reformulate the forms of order sought where, as in the present case, a measure the annulment of which is sought is replaced or amended by another measure with the same subject matter.

57 In those circumstances, to accept that the Kingdom of Spain had modified its application, within the meaning of Article 86 of the Rules of Procedure of the General Court, by introducing a new plea in law on the basis of Article 84 of those Rules of Procedure, would be tantamount to depriving the former provision of its effectiveness.

58 That finding cannot be called into question by the argument, put forward at the hearing by the Kingdom of Spain, whereby that new plea in law complied, in any event, with the formal requirements on the modification of the application, referred to in Article 86 of the Rules of Procedure of the General Court.

59 As the Advocate General notes in point 46 of her Opinion, the applicant is required, in a statement in modification of the application, to set out unambiguously and in a sufficiently clear and precise manner the subject matter of the proceedings and the form of order sought by the applicant, so that the General Court does not rule *ultra petita*. On that basis, a statement in modification must, in accordance with Article 86(4) of the Rules of Procedure of the General Court, contain, inter alia, the modified form of order sought.

60 The new plea in law raised by the Kingdom of Spain before the General Court, which is expressly based on Article 84 of the Rules of Procedure of the General Court and not on Article 86 of those Rules, manifestly fails to meet the requirements referred to in the preceding paragraph of the present judgment. In fact, and as the Advocate General notes in point 52 of her Opinion, in the letter of 23 December 2015 introducing that plea in law, the Kingdom of Spain expressly maintained its initial form of order sought, that is to say, the annulment of Decision C(2014) 6846 final.

61 It follows from the foregoing that, in the first place, the General Court erred in law in ruling, in paragraph 36 of the judgment under appeal, that, by introducing its new plea in law on the basis of Article 84 of the Rules of Procedure of the General Court, the Kingdom of Spain had requested the annulment of Decision C(2015) 7193 final. It thereby wrongly inferred, in paragraph 37 of the judgment under appeal, that that plea in law was admissible.

62 However, it is clear from the case-law of the Court of Justice that an error of law committed by the General Court does not invalidate a judgment under appeal if its operative part is well founded on other legal grounds (see judgment of 21 September 2017, *Easy Sanitary Solutions and EUIPO* v *Group Nivelles*, C-361/15 P and C-405/15 P, EU:C:2017:720, paragraph 73 and the case-law cited).

63 In the present case, since the Kingdom of Spain could not modify its application on the basis of Article 84 of the Rules of Procedure of the General Court, the new plea in law that it raised before the General Court, which concerned Decision C(2015) 7193 final, ought to have been rejected by the latter as inadmissible, given that the new plea had not been raised in support of a validly modified form of order. It follows that the operative part of the judgment under appeal appears to be well founded on other legal grounds.

64 In the second place, in so far as the Kingdom of Spain failed to modify its claim for annulment before the General Court in order to extend, to Decision C(2015) 7193 final, the first ground of appeal, which aims, in essence, to criticise the General Court for failing to annul that decision, extends the subject matter of the proceedings before the General Court in breach of Article 170(1) of the Rules of Procedure of the General Court.

65 Therefore, the first ground of appeal must be rejected as inadmissible.

The second ground of appeal

66 There are two parts to the second ground of appeal.

The first part

– *Arguments of the parties*

67 By the first part of the second ground of appeal, the Kingdom of Spain submits that the General Court's analysis, contained in paragraphs 89 to 107 of the judgment under appeal, is flawed inasmuch as it found that the first condition arising from the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415) ('the first Altmark condition') had not been met.

68 In the first place, the Kingdom of Spain takes the view that the General Court erred in law in ruling that Spanish legislation did not clearly define the service of general economic interest ('SGEI') at issue. In that regard, it is submitted that the General Court examined the legal framework, but that its assessment was manifestly flawed, since the 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') expressly classes the operation of radio and televisual broadcasting networks as a 'service of general interest'.

69 The appellant submits, first of all, that the finding in paragraph 102 of the judgment under appeal, whereby the definition of the service at issue as a SGEI was not sufficiently clear as that definition applied to all operators in the telecommunications sector and not to certain of them, is flawed. That finding is at odds with the case-law of the General Court, which accepts the possibility of entrusting

such a service to all operators in a given sector. Secondly, the General Court failed to take into account all measures by means of which the Spanish authorities entrusted public service obligations to the operators concerned, in particular Decree 347/2008 and the partnership agreements defining public service obligations in the Autonomous Community of Castilla-La Mancha. Lastly, the General Court erred in finding, in paragraph 102 of the judgment under appeal, that responsibility for the operation of the SGEI ought to have been entrusted to certain undertakings, since such undertakings could be appointed subsequently by way of a separate measure. Furthermore, the appellant submits that there is a contradiction between paragraph 104 of the judgment under appeal — in which the General Court held that defining a specific platform as an SGEI constituted a manifest error of assessment — and paragraph 105 of that judgment, in so far as the General Court upheld the Commission's finding as to the absence of any clear definition of the service at issue as an SGEI.

70 In the second place, it is submitted that, in paragraph 98 of the judgment under appeal, the General Court gave an overly formalistic interpretation of the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415), inasmuch as it found that it was necessary to verify the existence of an official measure which expressly determines the existence of a public service and which states the nature and duration of the public service obligations, together with the undertakings and territory concerned by those obligations. From that follows a misinterpretation of that judgment, which requires only that public service obligations be 'clearly apparent' from national law. Moreover, the formalistic interpretation given by the General Court fundamentally misreads the discretion enjoyed by the Member States in defining an SGEI.

71 The Kingdom of Spain points out that, in any event, it is for the Member State concerned to determine the modalities for the provision of an SGEI, in accordance with the discretion which it enjoys. An SGEI may therefore be defined by means of one or several separate and successive measures.

72 It is submitted, in the third place, that the General Court failed to examine all the relevant aspects of the case and to give sufficient reasons for the judgment under appeal. It disregarded the fact that, in the examination of the measure at issue, the Commission itself took the view that the agreements concluded by the Consejería de industria, energía y medio ambiente (Regional Department for Industry, Energy and the Environment) of Castilla-La Mancha were an integral part of that measure, as is apparent from recital 39 of the Commission's decision. A meticulous and impartial examination of all the relevant aspects of the case in point required that the Commission also assess those agreements. Consequently, the finding in paragraph 100 of the judgment under appeal constitutes an error of law. In addition, while the General Court held, in paragraph 106 of the judgment under appeal, that a market failure was insufficient to support a finding as to the existence of an SGEI, it was not, in the view taken by the Kingdom of Spain, exempted from its obligation to carry out a detailed examination of the question of the existence of an SGEI.

73 The Commission submits that that first part of the second ground of appeal is inadmissible and ineffective.

– Findings of the Court

74 By the first part of its second ground of appeal, the Kingdom of Spain submits, in essence, that the General Court's examination, so far as concerns the first Altmark condition, is vitiated by several errors of law.

75 As regards, in the first place, the alleged error committed by the General Court in its assessment of national law, it must be borne in mind that, according to settled case-law of the Court of Justice, where the General Court has determined or assessed the facts, the Court of Justice has sole jurisdiction under Article 256 TFEU to review their legal characterisation and the legal conclusions which were drawn from them. The assessment of the facts is not therefore, other than in cases where

the evidence produced before the General Court has been distorted, a point of law which is subject, as such, to review by the Court of Justice. Thus, with respect to the assessment, in the context of an appeal, of the General Court's determinations on national law, the Court of Justice has jurisdiction only to determine whether that law was distorted. In that respect, a distortion must be obvious from the documents on the Court's file, without there being any need to carry out a new assessment of the facts and the evidence (judgment of 26 April 2018, *Cellnex Telecom and Telecom Castilla-La Mancha* v *Commission*, C-91/17 P and C-92/17 P, not published, EU:C:2018:284, paragraphs 67 to 69 and the case-law cited).

76 As regards, first, the assessment of Law 32/2003, the General Court noted, in paragraph 102 of the judgment under appeal, that the classification as service of general economic interest contained in that law relates to all telecommunications services, including radio and television broadcasting networks. It held that 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 of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415). In addition, it also noted that (i) it is not apparent from Law 32/2003 that all telecommunications services in Spain were in the nature of SGEIs within the meaning of that judgment; and (ii) that law 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.

77 It must be held that it is not obvious from any of the elements adduced by the Kingdom of Spain that the General Court thereby distorted the content of Law 32/2003. In addition, in so far as that Member State criticises the General Court's conclusion concerning the general nature of that law — namely that it could not be concluded from that law that undertakings operating a terrestrial network had been entrusted with clearly defined public service obligations, in accordance with the first Altmark condition — it must be held that, in the light of the ambiguous aspects of that law referred to in paragraph 76 of the present judgment, that conclusion is not vitiated by any error of law (see, to that effect, judgment of 26 April 2018, *Cellnex Telecom and Telecom Castilla-La Mancha* v *Commission*, C-91/17 P and C-92/17 P, not published, EU:C:2018:284, paragraphs 71 and 72).

78 Secondly, the argument alleging that the General Court distorted national law in so far as it failed to take into account Decree 347/2008 and the agreements referred to in paragraph 72 of the present judgment, cannot succeed.

79 First of all, while the Kingdom of Spain provides, as part of its appeal, a very general summary of the content of that decree and those agreements, it fails to state in what, precisely, that distortion of national law consisted. Moreover, it is not obvious from that summary that the General Court distorted the provisions of Law 32/2003.

80 Secondly, although the Kingdom of Spain's submission must be understood as criticising the General Court for failing to state the reasons for which it did not refer to those elements of national law referred to in paragraph 78 of the present judgment, it should be remembered that it is for the General Court alone to assess the evidence produced before it. Although it must observe the general principles and the rules of procedure relating to the burden of proof and the taking of evidence and not distort the clear sense of the evidence, the General Court cannot be required to give express reasons for its assessment of the value of each piece of evidence presented to it, in particular where it considers that that evidence is unimportant or irrelevant to the outcome of the dispute (judgment of 26 April 2018, *Cellnex Telecom and Telecom Castilla-La Mancha* v *Commission*, C-91/17 P and C-92/17 P, not published, EU:C:2018:284, paragraph 76 and the case-law cited).

81 The Kingdom of Spain in no way submits that the General Court disregarded the obligation to observe the general principles and the rules of procedure in relation to the burden of proof and the taking of evidence so far as concerns the evidence referred to in paragraph 78 of the present judgment.

82 Lastly, the Kingdom of Spain's argument that the General Court erred in law in paragraph 100 of the judgment under appeal, must also be rejected.

83 The fact that there may, in the present case, be a failure in the market concerned is not, contrary to the submissions made by the Kingdom of Spain, a circumstance which may affect the discretion enjoyed by the General Court so far as concerns the assessment of the relevance of the evidence produced before it, in accordance with the case-law cited in paragraph 80 of the present judgment.

84 Moreover, the existence of such a market failure is not, after all, relevant in determining whether the undertakings concerned were indeed entrusted with discharging public service obligations by a public act or whether those obligations were clearly defined in that act (see, to that effect, judgment of 20 December 2017, *Comunidad Autónoma del País Vasco and Others* v *Commission*, C-66/16 P to C-69/16 P, EU:C:2017:999, paragraph 75).

85 In the second place, it should be noted that the argument put forward by the Kingdom of Spain, alleging that, in paragraph 98 of the judgment under appeal, the General Court misinterpreted the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415), is unfounded.

86 The Court of Justice in fact held that the first Altmark condition required it to be determined not only whether the beneficiary undertaking has indeed been entrusted with discharging public service obligations, but also whether those obligations are clearly defined in national law. That condition is designed to ensure transparency and legal certainty, and thus requires that minimum criteria be met in relation to the existence of one or more acts of public authority defining, in a sufficiently precise manner, at least the nature, duration and scope of the public service obligations imposed on the undertakings entrusted with the performance of those obligations. In the absence of a clear definition of such objective criteria, it is not possible to verify whether a particular activity may be covered by the concept of an SGEI (judgment of 26 April 2018, *Cellnex Telecom and Telecom Castilla-La Mancha* v *Commission*, C-91/17 P and C-92/17 P, not published, EU:C:2018:284, paragraph 44 and the case-law cited).

87 It therefore follows that the Kingdom of Spain cannot criticise the General Court for having adopted a formalistic approach to paragraph 98 of the judgment under appeal, in requiring the presence of an act of a public authority entrusting SGEI tasks to the operators at issue and of the universal and compulsory nature of those tasks, together with a statement as to the nature and duration of the public service obligations, the undertakings and territory concerned.

88 In the third place, as regards the argument submitted by the Kingdom of Spain, alleging that the General Court erred in law in paragraph 102 of the judgment under appeal, in that it disregarded the fact that the mandate conferring the public service tasks may be defined in several separate acts, is based on an incorrect reading of that paragraph. It is, in fact, in no way apparent from that paragraph that the General Court disregarded that possibility.

89 Equally, the Kingdom of Spain has misread paragraph 104 of the judgment under appeal, since the General Court simply finds, in that paragraph, that Recital 183 of the decision at issue, so far as concerns the existence of a manifest error on the part of the Spanish authorities in selecting a specific platform, has not been disputed by that Member State. The argument submitted by the Kingdom of Spain, alleging a contradiction between paragraphs 104 and 105 of the judgment under appeal, is therefore unfounded.

90 Consequently, the first part of the first ground of appeal must be rejected as being unfounded.

The second part

– *Arguments of the parties*

91 The second part of the second ground of appeal concerns the analysis of the fourth condition arising from the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415) ('the fourth Altmark condition), set out in paragraphs 108 to 113 of the judgment under appeal. The Kingdom of Spain submits that paragraph 110 of the judgment under appeal is vitiated by an error of law, in so far as the General Court held that the comparison with satellite technology was not sufficient to demonstrate that the public undertaking at issue was the most efficient.

92 It is submitted that the General Court failed to check whether, as required by the case-law of the Court of Justice, the Commission examined, diligently and impartially, all of the relevant elements from the administrative procedure, for the purpose of substantiating its finding as to the failure to satisfy the fourth Altmark condition. In particular, the Kingdom of Spain states that it claimed before the General Court that the conclusions drawn by the Commission from the comparative socio-economic study of the technological options for extending DTT signal coverage in the Autonomous Community of Castilla-La Mancha, dated 9 September 2008 ('the 2008 comparative study') were flawed, given that, according to that Member State, that study found that it seemed reasonable that the extension of the DTT service in that Autonomous Community should be carried out by means of terrestrial technology. In addition, the Member State submits that the correct review of its discretion, so far as concerns the definition of the public service at issue, consisted in verifying whether the successful tenderers had been selected in a public procurement procedure and whether the level of compensation was adequate.

93 Lastly, the Kingdom of Spain points out a contradiction between the judgment under appeal and the judgments of 26 November 2015, *Abertis Telecom and Retevisión I* v *Commission* (T-541/13, not published, EU:T:2015:898), and *Comunidad Autónoma de Cataluña and CTTI* v *Commission* (T-465/13, not published, EU:T:2015:900), in which the General Court held that the Commission had failed to justify, to the requisite legal standard, the failure to satisfy the fourth Altmark condition. This, it submits, amounts to a breach, on the part of the General Court, of the principle of the sound administration of justice.

94 The Commission submits that, if the first part of the second ground of appeal were to be rejected by the Court, the second part thereof would, in any event, become ineffective, given that the conditions arising from the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415), are cumulative.

– *Findings of the Court*

95 Given that the present part of the second ground of appeal concerns an alleged error made by the General Court so far as concerns its examination of the fourth Altmark condition, it must be noted that, in view of the cumulative nature of the conditions arising from the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415), even if the General Court erred in considering that one of those conditions was not satisfied, that could not bring about the setting aside of the judgment under appeal if the General Court also held, without erring in law, that another of those conditions was not satisfied (judgment of 20 December 2017, *Spain* v *Commission*, C-81/16 P, EU:C:2017:1003), paragraph 57 and the case-law cited).

96 It is clear from the examination of the first part of the second ground of appeal that the General Court did not err in law in rejecting the Kingdom of Spain's submissions challenging the recitals of the decision at issue, in which the Commission found that that the first Altmark condition had not been satisfied.

97 In those circumstances, the second part of the second ground of appeal must be rejected as ineffective.

The third ground of appeal

Arguments of the parties

98 By its third ground of appeal, the Kingdom of Spain submits that the General Court erred in law in finding, in paragraph 139 of the judgment under appeal, that the measure at issue was not compatible with the internal market, on the ground that it failed to observe the principle of technological neutrality. The General Court erred in making such a finding, it is submitted, given that the 2008 comparative study made a comparison between the respective costs of the satellite and terrestrial platforms.

99 It is submitted that it is apparent from paragraphs 132 to 138 of the judgment under appeal, that the Commission took the view that that study failed to demonstrate any significant cost difference between those two platforms, and that the findings of that study were not reliable. In upholding the Commission's assessment as to the failure to observe the principle of technological neutrality, the General Court failed to carry out its judicial review in accordance with the case-law arising from the judgment of 15 February 2005, *Commission* v *Tetra Laval* (C-12/03 P, EU:C:2005:87, paragraph 39). In particular, the Kingdom of Spain submits, in essence, that the 'failures' in the 2008 comparative study, which the General Court identified in paragraphs 143, 145 and 148 of the judgment under appeal, derive in fact from the Commission's flawed methodological premisses, which the General Court failed to verify. The Member State thereby takes the view that the approach adopted in that study was correct and that it was essential to understanding the reasons why the satellite platform was more expensive than the terrestrial, particularly on account of the presence of an existing terrestrial infrastructure.

100 The Commission submits that the arguments relied upon in support of the third ground of appeal are inadmissible or ineffective and, in any event, unfounded.

Findings of the Court

101 By its third ground of appeal, the Kingdom of Spain submits that the General Court failed to carry out its judicial review correctly in holding, in paragraph 139 of the judgment under appeal, that the Member State's arguments, which drew on the 2008 comparative study, failed to demonstrate that the Commission had erred in finding that the measure at issue was incompatible with the internal market.

102 It must be pointed out that, by the arguments put forward in support of that ground of appeal, the Kingdom of Spain claims, in reality, that the General Court failed to take due account of the 2008 comparative study, which is tantamount to disputing the General Court's assessment of the evidence.

103 According to settled case-law of the Court of Justice, appraisal of the facts and assessment of the evidence do not, save where the facts or evidence are distorted, constitute points of law subject, as such, to review by the Court of Justice on appeal (judgment of 20 December 2017, *Comunidad Autónoma de Galicia and Retegal* v *Commission*, C-70/16 P, EU:C:2017:1002, paragraph 47 and the case-law cited).

104 In any event, it is settled case-law of the Court that, in the context of the review conducted by the EU judicature of complex economic assessments made by the Commission in the field of State aid, it is not for that judicature to substitute its own economic assessment for that of the Commission. The EU Courts must, inter alia, establish not only whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the relevant 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 (judgment of 20 December 2017, *Spain* v *Commission*, C-81/16 P, EU:C:2017:1003, paragraph 70 and the case-law cited).

105 While the Kingdom of Spain submits that the General Court failed to carry out its review of the Commission's assessment so far as concerns the reliability of the 2008 comparative study, in accordance with that case-law, it must be noted that, in confining itself to asserting that the failures of the 2008 comparative study reflected a methodological choice on the part of the Spanish authorities, the Member State has failed to produce any concrete evidence in support of its claim.

106 The third ground of appeal must, therefore, be rejected as inadmissible and, in any case, unfounded.

107 Since none of the grounds of appeal relied upon by the Kingdom of Spain in support of its appeal has been upheld, the appeal must be dismissed in its entirety.

Costs

108 In accordance with the Article 184(2) of the Rules of Procedure of the Court, where the appeal is unfounded, the Court is to make a decision as to costs. Article 138(1) of those rules, which is applicable to appeal proceedings by virtue of Article 184(1) of the same rules, provides that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

109 Since the Commission has applied for costs and the Kingdom of the Spain has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Fourth Chamber) hereby:

1. Dismisses the appeal;

2. Orders the Kingdom of Spain to pay the costs.

[Signatures]