Reports of Cases

OPINION OF ADVOCATE GENERAL
COLLINS
delivered on 11 April 2024 [1]

**Case C-710/22 P**

**JCDecaux Street Furniture Belgium**
**v**

**European Commission**

(Appeal – State aid – Article 107(1) TFEU – Aid implemented by the Belgian authorities in favour of JCDecaux Street Furniture Belgium – Non-payment of rent and taxes for advertising displays installed in the territory of the City of Brussels (Belgium) – Economic advantage – Compensation mechanism – Commission decision declaring the aid incompatible with the internal market and ordering its recovery – No contradictory reasoning – Review by the Court of the assessment of the facts and evidence – Possible only where the facts or evidence have been distorted)

## Introduction

1. By the present appeal, JCDecaux Street Furniture Belgium ('JCDecaux') seeks to have set aside the judgment of the General Court of the European Union in Case T-642/19, [2] by which the General Court dismissed its action for annulment of Commission Decision (EU) 2019/2120 of 24 June 2019 on State aid granted by Belgium to JCDecaux Belgium Publicité (SA.33078 (2015/C) (ex 2015/NN)). [3] In particular, the present case gives the Court the opportunity to rule on the nature and scope of the judicial review that it is called upon to carry out in the context of an appeal.

## Background to the dispute

2. The City of Brussels (Belgium) and JCDecaux concluded two successive contracts, each for a term of 15 years, concerning the installation in that city of bus shelter advertisements and information street furniture ('MUPIs'), some of which could be used for advertising purposes. [4]

1 Original language: French.

2 Judgment of 7 September 2022, *JCDecaux Street Furniture Belgium* v *Commission* (T-642/19, 'the judgment under appeal', EU:T:2022:503).

3 OJ 2019 L 320, p. 119, 'the contested decision'.

4 More specifically, as is clear from recital 13 of the contested decision, 'the two contracts were for the installation of street furniture paid for by advertising displays measuring approximately 2 $m^2$, constituting a medium that could be used for advertising …'. Those displays generally had two screens, one intended for advertising displays and the other reserved for the City of Brussels for the provision of administrative and socio-cultural information.

3. The first contract, dated 16 July 1984 ('the 1984 contract'), concerned bus shelter advertisements and MUPIs of which JCDecaux retained ownership. It provided inter alia that JCDecaux was not required to make any payments to the City of Brussels for rent, right of occupancy or fees for the bus shelters and MUPIs, but was to provide it with a number of benefits in kind, namely to furnish, free of charge, waste-paper bins, public toilets and electronic newspapers, and to display a general map of the city, a tourist and hotel map and a map of the pedestrianised streets in the city. In return, JCDecaux was permitted to use for advertising purposes certain displays that were integrated into or separate from the bus shelters and MUPIs it supplied. Each of those displays could be used for a period of 15 years running from the date of its installation, as recorded in the presence of both parties to the contract. [5]

4. In 1998, the City of Brussels issued a call for tenders for the 'manufacture, supply, installation, commissioning and maintenance of [MUPIs], passenger shelters and display panels, some of which may be used for advertising purposes'. In order to honour its contractual obligations under the 1984 contract and to ensure the transparency of the call for tenders, the City of Brussels listed, in Annex 10 to the special tender specifications ('Annex 10'), 282 bus shelters and 198 MUPIs covered by the 1984 contract ('the displays listed in Annex 10'), in respect of which JCDecaux's right of use had not yet expired under the terms of the 1984 contract, indicating their locations and the expiry dates for the use of each display.

5. JCDecaux won the tender and a second contract was concluded on 14 October 1999 between it and the City of Brussels ('the 1999 contract'). That contract, which consisted of a purchase order, the special tender specifications and the annexes thereto, including Annex 10, replaced the 1984 contract. It provided, inter alia, that ownership of the installed street furniture would pass to the City of Brussels in return for payment of a net fixed price per item supplied, fully equipped, installed and made operational, and that JCDecaux was to pay a monthly rent to use that street furniture for advertising.

6. When the 1999 contract was implemented, some of the displays listed in Annex 10 were removed before the respective expiry dates stipulated in that annex, while others ('the displays at issue') were kept in place and JCDecaux continued to use them beyond those dates. The City of Brussels did not claim any payment of rent or taxes for the use of latter. That situation lasted until August 2011, when the last displays listed in Annex 10 were dismantled.

7. On 19 April 2011, Clear Channel Belgium ('CCB') lodged a complaint with the European Commission in which it claimed that, by continuing to use the displays at issue after the expiry dates stipulated for them, without paying rent or taxes to the City of Brussels, JCDecaux had benefited from State aid incompatible with the internal market.

8. On 24 March 2015, the Commission initiated the formal investigation procedure under Article 108(2) TFEU and invited the Kingdom of Belgium and other interested parties to submit their comments. The Commission received comments from the Kingdom of Belgium, CCB and JCDecaux. Additional discussions and exchanges took place between those parties and the Commission.

9. In their comments, the Belgian authorities stated inter alia that they had agreed to the retention and use of the displays at issue beyond the expiry dates stipulated in Annex 10 in order to maintain the economic balance of the 1984 contract, since some displays listed in that annex had been

[5] Consequently, in 1999, upon expiry of the 1984 contract, a number of displays covered by the 1984 contract could still be used until the end of their 15-year operating period.

removed early at the request of the City of Brussels, which, for mainly aesthetic reasons, wished to install other models. According to those authorities, since JCDecaux had suffered a disadvantage as a result of that early removal, it was acceptable that, in order to compensate for that early removal, it could keep other displays in place for longer than specified and no payment of rent or taxes would be required from JCDecaux for those displays. [6] The Belgian authorities acknowledged that there was a limited imbalance between the number of displays which were removed early and the number of displays which were kept in place beyond their respective expiry dates. By calculating the difference between the savings on rent and taxes that JCDecaux forwent by accepting those early removals and the savings on rent and taxes that it made by keeping other displays in place beyond those expiry dates, it would have benefited from a financial advantage amounting to a maximum of EUR 100 000 to EUR 150 000 between December 1999 and 2011. [7] The measure at issue could therefore constitute *de minimis* aid within the meaning of Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles [107 and 108 TFEU] to *de minimis* aid. [8]

10. On 24 June 2019 the Commission adopted the contested decision.

11. In recitals 66 to 69 of the contested decision, the Commission defined the subject of its assessment, stating inter alia that, having regard to the limitation rules in Article 17 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 [TFEU], [9] that assessment related only to the extent to which the retention of the displays at issue beyond the expiry dates specified in Annex 10 without payment of rent or taxes constituted State aid granted to JCDecaux after 15 September 2001.

12. In recitals 72 to 81 of the contested decision, the Commission examined the conditions relating to imputability to the State and the transfer of State resources. It pointed out inter alia that the Belgian authorities did not dispute that the measure at issue was imputable to them or that it had resulted in a loss of revenue for the City of Brussels in terms of the rent and taxes not charged on the displays at issue, which would otherwise have been replaced by displays under the 1999 contract.

13. In recitals 82 to 96 of the contested decision, the Commission analysed the condition relating to the existence of an economic advantage.

14. In that regard, first of all, the Commission noted that, from 1999 onwards and as the authorisations based on the 1984 contract expired, JCDecaux had continued to use advertising displays on the territory of the City of Brussels without paying rent or taxes when, under the 1999 contract, they should have been removed. Under the same contract, rent and taxes would have been payable for the operation of the new advertising displays replacing them. [10]

6 That arrangement will be referred to in the remainder of this Opinion using the expression 'compensation mechanism'. JCDecaux took the same position in its comments, pointing out, inter alia, that the use of the displays at issue was not governed by the 1999 contract and that they had been retained in the context of the performance of the 1984 contract without any transfer of public resources. It also maintained that neither the displays covered by the 1984 contract nor those covered by the 1999 contract were taxable.

7 In its written observations, CCB stated that the economic advantage from which JCDecaux benefited as a result of the use of the displays at issue beyond their respective expiry dates was greater than EUR 2 150 000, excluding interest.

8 OJ 2006 L 379, p. 5.

9 OJ 2015 L 248, p. 9.

10 Recital 84 of the contested decision.

15. Next, the Commission observed that the Belgian authorities had acknowledged that, 'overall', JCDecaux had enjoyed an economic advantage and that they merely contested the scale of that advantage. As regards their argument based on the existence of a compensation mechanism, it recalled, referring to the judgment in *Orange* v *Commission*,[11] that it was only in so far as a State intervention must be regarded as compensation for the services provided by undertakings entrusted with performing a service in the general public interest in order to discharge public service obligations in accordance with the criteria established in the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*,[12] that such a measure fell outside Article 107(1) TFEU. It stated that the 1984 and the 1999 contracts are purely commercial contracts and their provisions do not entrust a public service responsibility to JCDecaux. The alleged compensation, 'even assuming it is actually designed to offset the disadvantage related to a potential obligation to withdraw certain displays ahead of schedule', therefore confers an advantage on JCDecaux. That conclusion is all the more obvious 'in that it is hard to believe that [JCDecaux] suffered from a structural disadvantage, since it agreed to remove the displays on its own initiative, and, furthermore, the Belgian authorities themselves recognise that the compensation in question went beyond what was required by the alleged disadvantage'.[13] The Commission also contended that neither of the situations described in paragraphs 69 and 71 of its Notice on the notion of State aid as referred to in Article 107(1) [TFEU][14] applied in this case, reiterating inter alia that JCDecaux had agreed to remove some of the displays falling under the 1984 contract 'on its own initiative'.[15] It added that the City of Brussels could not be considered to have acted as a private market economy operator. The alleged compensation mechanism was not formalised or monitored in any way, it was not apparent from any evidence provided to the Commission that any kind of negotiation took place between the City of Brussels and JCDecaux regarding that mechanism, and there was nothing to indicate that the City of Brussels had carried out an analysis of the 'actual loss incurred by [JCDecaux] as a result of the early replacement of certain displays governed by the 1984 contract compared with the profit earned from keeping in place other displays, which were, moreover, completely amortised under the same contract (the cost of those panels, including [JCDecaux's] margin, can be reasonably supposed to have been met in full from their operation during the legal duration of the 1984 contract)'.[16]

16. Lastly, the Commission stated that its position regarding the presence of an advantage was confirmed by a judgment of the cour d'appel de Bruxelles (Court of Appeal, Brussels, Belgium) of 29 April 2016,[17] in which that court found that JCDecaux had not complied with the removal dates specified in Annex 10 for the displays at issue and had used those displays on public property in the City of Brussels without right or title. The cour d'appel de Bruxelles (Court of Appeal, Brussels) held that by so doing JCDecaux had objectively acted unlawfully, and contrary to honest market practice, since the use in its network of advertising displays that should not or should no longer be part of it gave it an unlawful competitive advantage that could divert advertisers from its competitor, CCB.

[11] Judgment of 26 October 2016 (C-211/15 P, EU:C:2016:798, paragraphs 41 to 44).

[12] Judgment of 24 July 2003 (C-280/00, EU:C:2003:415).

[13] Recital 89 of the contested decision.

[14] OJ 2016 C 262, p. 1.

[15] Recitals 91 and 93 of the contested decision.

[16] Recital 94 of the contested decision.

[17] Judgment of the cour d'appel de Bruxelles (Court of Appeal, Brussels) of 29 April 2016 (Ninth Chamber) in Case 2011/AR/140.

17. The Commission concluded from the foregoing considerations that JCDecaux's retention and operation of the displays at issue between 1999 and 2011, beyond the expiry dates specified in Annex 10, without paying any rent or tax, had the effect of reducing the costs that it would normally have incurred in the pursuit of its business and thereby constituted an economic advantage.

18. In recitals 97 to 102 of the contested decision, the Commission examined the condition relating to the selectivity of the advantage. It noted, inter alia, that the measure at issue was, by its nature, an individual measure, in which case the identification of the advantage made it possible, in principle, to presume that it was selective.

19. In recitals 103 to 121 of the contested decision, the Commission found that the measure at issue was liable to distort competition and affect trade between Member States. In particular, it rejected the Belgian authorities' argument that that measure could constitute *de minimis* aid within the meaning of Regulation No 1998/2006.

20. In recital 122 of the contested decision, the Commission concluded from all of the foregoing considerations that the measure at issue constituted aid for the purposes of Article 107(1) TFEU.

21. After finding, in recitals 123 and 124 of the contested decision, that the measure at issue constituted unlawful State aid since it had not been notified to it and, in recitals 125 to 130 of that decision, that that aid could not be considered compatible with the internal market, the Commission, in recitals 131 to 144 of the contested decision, examined the question of the amount of incompatible aid to be recovered. In that regard, it explained that the 'general principle' to be applied to calculate the amount of incompatible aid was to estimate the amount of rent and taxes the City of Brussels should have collected without the measure at issue, stating that that amount should be 'calculated for each display governed by the 1984 contract kept in place after 15 September 2001, taking as the reference the rent due under the 1999 contract and the taxes generally applicable to advertising displays between the original date specified for removal (if the original date was after 15 September 2001) or 15 September 2001 (if the original date was before 15 September 2001) and the date on which removal actually took place'.[18] After recalling that it considered that the argument put forward by the Belgian authorities in relation to the compensation mechanism was 'unfounded', it took the view that 'the advantage conferred on [JCDecaux corresponded] to all the savings made by the undertaking by continuing to use the displays governed by the 1984 contract instead of replacing them with displays complying with the 1999 contract'.[19] It stated that the amount of aid should therefore be calculated 'without any offsetting mechanism' and by taking into consideration, 'for each of the displays in question and each relevant period, the rent and taxes arising from the tax regulations for 2001 and after for a display of the same size'.[20]

[18] Recital 132 of the contested decision.

[19] Recital 134 of the contested decision.

[20] Recital 137 of the contested decision. Recital 138 of the contested decision and footnotes 46 and 49 thereto refer to the tax regulations in question. See also paragraph 56 of the judgment under appeal.

## The procedure before the General Court and the judgment under appeal

22. By application lodged at the Registry of the General Court on 25 September 2019, JCDecaux brought an action for annulment of Articles 1 to 4 of the contested decision. By order of 22 April 2020, the President of the First Chamber of the General Court granted CCB leave to intervene in support of the form of order sought by the Commission.

23. In support of its action, JCDecaux put forward four pleas in law, the first being the principal and the other three in the alternative. By the first plea, which was divided into three parts, it claimed that the Commission had committed a manifest error of assessment and an error of law in finding that the operation of the displays at issue beyond the expiry dates stipulated in Annex 10 constituted an advantage. By the first part, it complained that the Commission had wrongly disregarded the compensation mechanism. By the second part, it submitted that the Commission had adopted an incorrect counterfactual scenario in considering that rent and taxes should have been collected for the displays at issue which were kept in place beyond their respective expiry dates. By the third part, it claimed that the Commission had wrongly stated that the 1984 contract was 'purely commercial' and thus refused to apply the criteria established by the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*.[21] By the second plea, it submitted that the hypothetical State aid was compatible with the internal market pursuant to the Communication from the Commission on the European Union framework for State aid in the form of public service compensation[22] and Commission Decision 2012/21/EU of 20 December 2011 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 services of general economic interest.[23] The third plea was divided into two parts. By the first part, it complained that the Commission had not dealt adequately with the evidence relied on by the parties, prejudged the amount of aid to be recovered in its press release, and infringed its internal rules of procedure. By the second part, it claimed inter alia that it was impossible to quantify the alleged advantage since the 1984 contract did not provide for the payment of any rent, right of occupancy or fees. By the fourth plea, it claimed that the alleged State aid was in any event time-barred.

24. By the judgment under appeal, the General Court dismissed those four pleas in law and, consequently, the action in its entirety, ordered JCDecaux to bear its own costs and to pay those incurred by the Commission and ordered CCB to bear its own costs.

25. The findings of the General Court which are relevant for the purposes of this appeal are, essentially, those relating to the first and second parts of the first plea in law and to the second part of the third plea in law.

26. As regards the first part of the first plea in law, the General Court concluded that the Commission was right to consider that the retention and use by JCDecaux of the displays at issue after the expiry dates stipulated in Annex 10 constituted an economic advantage for the purposes of Article 107(1) TFEU, 'even if the retention of those displays was a compensation mechanism established by the 1984 contract'.[24]

[21] Judgment of 24 July 2003 (C-280/00, EU:C:2003:415).

[22] OJ 2012 C 8, p. 15.

[23] OJ 2012 L 7, p. 3.

[24] Paragraph 42 of the judgment under appeal.

27. In that regard, in the first place, the General Court noted that the concept of 'State aid' is an objective legal concept defined directly by Article 107(1) TFEU, which does not distinguish between the causes or the objectives of State aid measures, but defines them in relation to their effects. The fact that the objective of the State measure was to maintain the economic balance of the 1984 contract, or that that objective was consistent with the principles of national law, cannot rule out *ab initio* the classification of such a measure as 'State aid'. [25]

28. In the second place, the General Court held that the fact that JCDecaux had continued to use the displays at issue after the expiry dates stipulated in Annex 10, without paying rent or taxes to the City of Brussels, had the effect of mitigating those charges which would have been included in its budget. [26] It noted that it was common ground between the parties that, after the conclusion of the 1999 contract, JCDecaux could install and use street furniture in the territory of the City of Brussels only under the conditions laid down in that contract, in accordance with which it had to pay rent and taxes. It also found that, according to Annex 10, by derogation from the terms of the 1999 contract, JCDecaux could continue to use the displays listed in that annex under the conditions laid down in the 1984 contract, but only until the expiry dates stipulated in that annex. It added that, after those dates, the displays in question were to be replaced by new displays covered by the 1999 contract, and would therefore be subject to the obligation to pay taxes and rent. [27] It concluded that the fact that JCDecaux continued to use the displays at issue under the conditions laid down by the 1984 contract after those dates had enabled it to avoid installing and using new displays covered by the 1999 contract and, consequently, to avoid paying the rent and taxes which it should have paid under that contract. [28] The General Court also recalled certain findings made by the cour d'appel de Bruxelles (Court of Appeal, Brussels) in its judgment of 29 April 2016. [29]

29. In the third place, [30] the General Court considered that the Commission was right to rely on the judgments in *Orange* v *Commission* [31] and in *Altmark Trans and Regierungspräsidium*. [32]

30. In the fourth place, applying the considerations the Commission set out in that regard, [33] the General Court endorsed the Commission's conclusion that the alleged compensation mechanism could not be regarded as consistent with the test of the conduct of a private market economy operator. [34]

31. As regards the second part of the first plea in law, the General Court concluded that the Commission had not made an error of assessment in finding that JCDecaux had saved on rent and taxes, which constituted an advantage. [35] In respect of the rent not charged, the General Court reiterated that, after the entry into force of the 1999 contract, JCDecaux could install and use

25 Paragraphs 24 to 26 of the judgment under appeal.

26 Paragraph 28 of the judgment under appeal.

27 Paragraph 29 of the judgment under appeal.

28 Paragraph 30 of the judgment under appeal.

29 Paragraph 31 of the judgment under appeal.

30 Paragraphs 34 to 36 of the judgment under appeal.

31 Judgment of 26 October 2016 (C-211/15 P, EU:C:2016:798).

32 Judgment of 24 July 2003 (C-280/00, EU:C:2003:415). The General Court examined in greater detail the question of the conditions established by the case-law arising from that judgment in paragraphs 66 to 75 of the judgment under appeal. It held that the Commission had not committed an error of assessment in concluding, in recital 88 of the contested decision, that the 1984 contract was a purely commercial contract, and that the first of those conditions was not satisfied.

33 See point 15 of this Opinion.

34 Paragraphs 37 to 41 of the judgment under appeal.

35 Paragraph 65 of the judgment under appeal.

street furniture in the territory of the City of Brussels only under the conditions laid down in that contract, according to which it had to pay rent and taxes.[36] In respect of the taxes not charged, the General Court inter alia rejected JCDecaux's argument that, in the absence of a uniform system of taxation in the national territory, or even in the territory of the Brussels-Capital Region, the tax regulations adopted by the City of Brussels could not constitute a reference system. It took the view that, if that argument were to be interpreted as relating to the selective nature of the measure, it had to be rejected, since, in the case of an individual measure, the selectivity of the economic advantage is presumed.[37] In any event, during the pre-litigation procedure, the Belgian authorities did not dispute that those regulations constituted the reference tax system.[38] It also took the view that the Commission was right to conclude that the tax regulations the City of Brussels adopted from 2001 onwards should have applied to the displays at issue which were kept in place after their respective expiry dates and that the exemption the City of Brussels applied before the 2009 tax year was a derogation from the reference system which constituted an advantage conferred by the City of Brussels through State resources.[39] It rejected the relevance, as regards the classification of the measure at issue as State aid, of the two judgments of the tribunal de première instance francophone de Bruxelles (Brussels Court of First Instance (French-speaking), Belgium) of 4 November 2016,[40] which found that JCDecaux was not liable for municipal advertising tax under the 1999 contract.[41]

32. As regards the second part of the third plea in law, the General Court observed inter alia that the Commission had explained why, in its view, the advantage enjoyed by JCDecaux exceeded that estimated by the Belgian authorities.[42] It rejected, moreover, JCDecaux's argument that it was impossible to quantify that advantage and that its rights of defence had been infringed as a consequence thereof as being based on the incorrect premiss that the retention and use of the displays at issue beyond the expiry dates provided for constituted an advantage only in so far as they went beyond what was offset by the compensation mechanism.[43]

## Procedure before the Court of Justice and forms of order sought

33. By document lodged at the Registry of the Court of Justice on 17 November 2022, JCDecaux brought the present appeal. It asks the Court to set aside the judgment under appeal, to grant the form of order sought by it at first instance by annulling Articles 1 to 4 of the contested decision and to order the Commission to pay the costs. In its response, lodged at the Registry of the Court of Justice on 1 February 2023, the Commission asks the Court to dismiss the appeal and to order JCDecaux to pay the costs. CCB waived its right to lodge a response.

34. At the hearing on 17 January 2024, JCDecaux, the Commission and CCB presented oral argument and answered the written and oral questions the Court put to them. CCB contended that the appeal should be dismissed. It made no application for costs.

36 Paragraphs 48 and 49 of the judgment under appeal.

37 Paragraph 53 of the judgment under appeal.

38 Paragraph 54 of the judgment under appeal.

39 Paragraph 61 of the judgment under appeal.

40 Judgments of the tribunal de première instance de Bruxelles (Brussels Court of First Instance) of 4 November 2016 (RG 2012/9807/A + 2012/9808/A and RG 2012/14576/A and 2014/5965/A).

41 Paragraph 63 of the judgment under appeal.

42 Paragraph 93 of the judgment under appeal.

43 Paragraph 95 of the judgment under appeal.

## Analysis

35. JCDecaux raises two grounds in support of its appeal, alleging, first, contradictory reasoning vitiating the judgment under appeal and an error of law in the interpretation and application of the concept of 'economic advantage' for the purposes of Article 107(1) TFEU and, second, a manifest distortion of the facts and of the applicable legal framework.

### *The first ground of appeal*

#### *Arguments of the parties*

36. By that ground of appeal, JCDecaux submits, principally, that, in the judgment under appeal, the General Court adopted contradictory reasoning and erred in law in concluding that there was an economic advantage. It notes that, in paragraphs 31 and 40 of that judgment, the General Court reproduced the findings of the cour d'appel de Bruxelles (Court of Appeal, Brussels) in its judgment of 29 April 2016 that 'it had not been expressly authorised by the City of Brussels' and had used in the territory of the City of Brussels many of the displays listed in Annex 10 'without right or title'. In paragraph 42 of that judgment, the General Court concluded, 'on that basis alone', that the retention and use by JCDecaux of the displays at issue after the expiry dates stipulated in Annex 10 constituted an economic advantage. According to JCDecaux, although the cour d'appel de Bruxelles (Court of Appeal, Brussels) found that those displays had been kept in place 'without right or title', that was because it had concluded that the City of Brussels had not given explicit, or even implicit, authorisation to change ('interversion')[44] the advertising displays. In the absence of a decision or intervention by the public authorities, there cannot, by definition, be State aid since it requires 'at least' a positive or negative act by those authorities. Even if JCDecaux had benefited from an advantage, that advantage would arise from the fact that it had, of its own motion, used the displays at issue by occupying public property unlawfully. Such conduct cannot, without a manifest contradiction, serve as the basis for a finding of the grant of an economic advantage by the public authorities.

37. In the alternative, JCDecaux complains that the General Court vitiated the judgment under appeal by a second contradiction in reasoning that, in paragraph 42 of that judgment, it held that the advantage granted to it by the City of Brussels constituted aid even if the retention of the displays at issue was regarded as a 'compensation mechanism established by the 1984 contract'. It criticises the fact that the General Court did not draw any conclusions from that assertion, which would call into question both the legal classification adopted by the Commission and the method of calculating the amount of aid to be recovered.[45] That judgment would lead to the recovery of the alleged advantage in its entirety, that is to say without taking into account the costs JCDecaux incurred as a result of the early removal of a number of displays listed in Annex 10 and the contractual damage that it suffered. According to JCDecaux, if the General Court accepts that the retention of the displays at issue could constitute compensation, then the entire economic advantage which may have been granted cannot automatically constitute State aid.

[44] It is clear from the judgment of the cour d'appel de Bruxelles (Court of Appeal, Brussels) of 29 April 2016 that, by referring to the 'interversion theory', JCDecaux seeks to explain that it 'only kept in place certain old furniture beyond its date in order to compensate for the premature replacement of old furniture that could remain in place by new furniture'.

[45] In that regard, JCDecaux refers in particular to paragraphs 83 to 89 of the judgment under appeal.

38. The Commission, first of all, contends that, by its arguments, JCDecaux is essentially seeking a new assessment of the facts and more specifically of its compensation mechanism theory, which both the national court and the General Court rejected. Such a new assessment of the facts falls outside of the jurisdiction of the Court of Justice at the appeal stage.

39. Next, reiterating some of the considerations set out in the judgment under appeal and summarised in points 27 to 30 of this Opinion, the Commission submits that the General Court was right to rule out the relevance of the compensation mechanism.

40. As regards JCDecaux's reference to the judgment of the cour d'appel de Bruxelles (Court of Appeal, Brussels) of 29 April 2016, the Commission observes, moreover, that the General Court's findings with regard to national law are assessments of fact which, except in cases where national law has been distorted, are not subject to review by the Court of Justice in appeal proceedings. JCDecaux merely challenges the content and scope of that judgment. It is furthermore incorrect to claim that the General Court relied solely on that judgment to establish the existence of an advantage. JCDecaux's argument based on the alleged absence of an act of the public authorities is inadmissible on the ground that it relates to the condition that the measure at issue is imputable to the State, which it did not contest at first instance. In any event, that argument is manifestly unfounded, since the present case concerns a negative act on the part of the City of Brussels consisting in allowing the displays at issue to continue to be used without seeking to collect rent and taxes.

41. Lastly, the Commission points out that the classification of a measure as State aid and the quantification of its amount are two separate issues. It considers that taking account of the compensation theory cannot lead to a 'reassessment of the mechanism for calculating the recovery of the aid' established in the contested decision. It adds that, in order for the measure at issue to escape classification as State aid, the City of Brussels should have carried out an assessment of the damage JCDecaux allegedly suffered. Since the City of Brussels did not carry out such an assessment, the amount of aid to be recovered corresponds to the rent and taxes that JCDecaux would have had to pay for the duration of the use of the displays at issue beyond the expiry dates stipulated until their actual removal. Even if the compensation mechanism did exist, *quod non*, it cannot call into question either the legal classification of the advantage JCDecaux enjoyed, or the calculation of the amount of aid to be recovered.

*Assessment*

42. I point out that, under Article 256(1) TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union, an appeal is limited to points of law. The General Court has exclusive jurisdiction to establish the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it, and to assess those facts. Save where the evidence produced before the General Court has been distorted, that assessment does not constitute a question of law which is, as such, subject to review by the Court of Justice. When the General Court has established or assessed the facts, the Court of Justice has jurisdiction, under Article 256 TFEU, to review the legal characterisation of those facts by the General Court and the legal conclusions which it has drawn from them. [46]

[46] Judgment of 12 May 2022, *Klein* v *Commission* (C-430/20 P, EU:C:2022:377, paragraph 39 and the case-law cited).

43. Contrary to the Commission's submissions, I consider that the arguments JCDecaux put forward by in support of the first ground of appeal do not seek to obtain from the Court a new assessment of the facts concerning the compensation mechanism or national case-law. As JCDecaux points out in its reply, the 'fundamental objection' which it raises does not relate either to the assessment of the facts or to the interpretation of national law by the General Court, but is based on the existence of an alleged 'fundamental contradiction' vitiating the reasoning of the judgment under appeal. In that regard, I point out that, according to settled case-law, the question whether the grounds of a judgment of the General Court are contradictory is a question of law which is amenable to judicial review on appeal. [47]

44. The contradictory reasoning JCDecaux relies on principally resides in the fact that the General Court cannot simultaneously find, on the basis of the judgment of the cour d'appel de Bruxelles (Court of Appeal, Brussels) of 29 April 2016, that JCDecaux had used the displays at issue without right or title and confirm the Commission's conclusion as to the existence of State aid, which by definition implies a decision or intervention by public authorities conferring an advantage. The contradictory reasoning JCDecaux relies on in the alternative is found in paragraph 42 of the judgment under appeal, where the General Court considered that the alleged advantage constituted aid whilst admitting that the retention of the displays at issue could be a compensation mechanism established by the 1984 contract. In my view, by those arguments, JCDecaux does not call into question either the content or the scope of the judgment of the cour d'appel de Bruxelles (Court of Appeal, Brussels) of 29 April 2016 as established by the General Court. On the contrary, it endorses those findings to support its principal line of argument. Moreover, I observe that although JCDecaux's written submissions reaffirm the existence of the compensation mechanism, it does not, however, challenge any of the assessments set out in paragraphs 25, 26 and 34 to 41 of the judgment under appeal which endorse the Commission's conclusion that that mechanism, assuming it were established, does not preclude the conferral of an advantage on JCDecaux.

45. In my view, the other ground of inadmissibility the Commission put forward, according to which, by its argument based on the alleged absence of an act of the public authorities, JCDecaux challenges the condition relating to the imputability of the measure at issue to the State for the first time at the appeal stage, should also be rejected. While it is true that JCDecaux does not appear to have raised that argument in those terms before the General Court, it is nevertheless apparent from the appeal that it is not an autonomous and new plea in law that should be declared inadmissible as having been raised for the first time, but it is merely an argument put forward in support of the plea in law alleging a contradiction in the reasoning which led the General Court to confirm the existence of State aid.

46. That said, I do not agree with JCDecaux's assertion that it was 'solely on the basis' of the findings in question of the cour d'appel de Bruxelles (Court of Appeal, Brussels) that the General Court concluded that there was an economic advantage in the present case. An examination of the assessment of the first plea raised before the General Court [48] reveals that the General Court considered that the fact that JCDecaux had retained and continued to use the displays at issue beyond their respective expiry dates stipulated in Annex 10 without paying rent or taxes had the effect of mitigating the charges which would have normally been included in its budget. That assessment was based inter alia on an examination of the provisions of the 1984 contract and the 1999 contract, including Annex 10, the relevant provisions of the tax regulations of the City of

[47] Judgment of 16 July 2009, *Der Grüne Punkt – Duales System Deutschland* v *Commission* (C-385/07 P, EU:C:2009:456, paragraph 71 and the case-law cited).

[48] Paragraphs 17 to 76 of the judgment under appeal.

Brussels cited in the contested decision and the comments the Belgian authorities submitted during the pre-litigation procedure. The General Court moreover considered that the compensation mechanism alleged by those authorities and JCDecaux did not exclude the existence of an advantage, for the various reasons summarised in points 27 to 30 of this Opinion. The references the General Court made in that context to the findings of the cour d'appel de Bruxelles (Court of Appeal, Brussels) are therefore only one of a number of factors which it took into account in order to find that such an advantage existed.

47. I take the view that neither of the two contradictions in reasoning JCDecaux relies on is well founded.

48. First, it is true that, in the judgment of 29 April 2016, the cour d'appel de Bruxelles (Court of Appeal, Brussels) found that JCDecaux had not been 'expressly authorised by the City of Brussels to make a change in the basis ("interversion") of the advertising displays' and that 'the lack of reaction by [the City of Brussels] to the retention of [MUPIs] beyond the date authorised for each of them [could] not be interpreted as entailing an implied and definite agreement on the part of the public authority to derogate from the deadlines agreed for each display'. However, it should be borne in mind that, in that judgment, the appeal court ruled exclusively in the light of the Law on commercial practices and the provision of information to and the protection of consumers of 14 July 1991 [49], as it was called upon to determine whether the fact that JCDecaux had kept in place and continued to use certain displays without having the necessary authorisations constituted, in accordance with Article 94 of that law, an act contrary to honest commercial practices capable of adversely affecting the professional interests of its competitor CCB. In that context, in my view, the findings of the cour d'appel de Bruxelles (Court of Appeal, Brussels) must be understood as referring to an absence of authorisation for the purposes of Belgian administrative law. [50] That does not in any way preclude the fact that, from the perspective of EU rules on State aid, [51] the negative, or at least passive, attitude of the City of Brussels, which consisted, in full knowledge of the facts, in not opposing the retention and use, on its territory, of a number of advertising displays by JCDecaux beyond the expiry dates stipulated and, above all, in refraining from collecting the rent and taxes normally due may constitute State aid for the purposes of Article 107(1) TFEU. [52] I would add that JCDecaux cannot maintain, as it does in the reply, that the Commission, in describing such conduct on the part of the City of Brussels in its response as a 'negative act', introduced a new argument at the appeal stage. The Commission is merely responding to an argument JCDecaux raised in support of the main complaint in its first ground of appeal.

49. Second, it seems to me that the alleged contradictory reasoning relied on in the alternative by JCDecaux is based on an erroneous reading of paragraph 42 of the judgment under appeal. As the Commission confirmed at the hearing in response to a question from the Court of Justice, what

[49] *Moniteur Belge* of 29 August 1991.

[50] In its judgment, the cour d'appel de Bruxelles (Court of Appeal, Brussels) noted inter alia that 'the installation of street furniture on public property and its use for advertising purposes requires the authorisation of the public authority, which may take various forms; in the absence of authorisation, the installation and operation take place without right or title and are therefore unlawful'. It also noted that 'each display is the subject of an authorisation granted for a specified location and a specific duration' and that 'the authorisations and displays are not interchangeable as the holder sees fit'. Furthermore, the cour d'appel de Bruxelles (Court of Appeal, Brussels) observed that 'CCB [directed] its action against [JCDecaux], the perpetrator of the practice at issue, and not against the City of Brussels' and that 'it [was] not a matter in the present case of controlling the manner in which [the City of Brussels] executed the 1984 contract and the 1999 public contract'.

[51] In its judgment of 29 April 2016, the cour d'appel de Bruxelles (Court of Appeal, Brussels) states that it 'does not have to examine whether [JCDecaux] has received State aid or to assess it'.

[52] Judgment of 12 October 2000, *Spain* v *Commission* (C-480/98, EU:C:2000:559, paragraphs 19 to 21). See also paragraph 68 of the Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU.

the General Court wished to express in that paragraph is that, even if the reality of the compensation mechanism and the intention on the part of the City of Brussels to adhere to it are established to the requisite legal standard, that does not preclude the conclusion that JCDecaux enjoyed an economic advantage, since, in particular, that mechanism did not satisfy the first condition of the case-law arising from the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*[53] and could not be deemed normal conduct of a market economy operator. That is, moreover, clear from a combined reading of paragraph 42 of the judgment under appeal and the considerations which precede it.[54] Having rejected the relevance of the compensation mechanism relied on, the General Court also cannot be criticised for not having re-examined the method for calculating the aid to be recovered established in the contested decision in the light of that mechanism.

50. In the light of the foregoing considerations, I consider that the first ground of appeal is admissible, but unfounded.

### *The second ground of appeal*

#### *Arguments of the parties*

51. By that ground of appeal, which is divided into two parts, JCDecaux submits that the General Court manifestly distorted the facts and the applicable legal framework by finding that the displays at issue which had been kept in place beyond the expiry dates stipulated in Annex 10 were *ipso facto* covered by the legal regime of the 1999 contract and, therefore, were subject to the payment of rent and taxes.

52. By the first part, JCDecaux disputes the General Court's findings in paragraphs 29 and 30 of the judgment under appeal. In that regard, first of all, it contends that, in accordance with the 'basic principles of contract law', the displays installed under the 1984 contract remained governed by that contract until they were actually removed, even if that took place after the expiry dates stipulated in Annex 10, remained its property and were not subject to any obligation to pay rent or taxes.[55] It points out that it was in return for a considerable investment, consisting of the design, manufacture, installation and maintenance of the bus shelters and MUPIs made available to the City of Brussels, that it obtained the right to use them for advertising purposes, and that the economic balance of that contract was based on precise contractual obligations. Next, JCDecaux states that no provision in the 1999 contract provides for the automatic removal of the displays covered by the 1984 contract or any other existing street furniture; on the contrary, the 1999 contract expressly provides that displays installed in 1999 may, and even must, coexist with those listed in Annex 10 without the contractual terms applicable to those displays being amended by it. It adds that there was also no obligation to replace, display by display and in the same locations,[56] the displays covered by the 1984 contract with new displays covered by the 1999 contract. The retention of certain displays covered by the 1984 contract and belonging to

[53] Judgment of 24 July 2003 (C-280/00, EU:C:2003:415).

[54] See paragraphs 25, 26, 28 to 41 and 68 to 75 of the judgment under appeal. In the present appeal, JCDecaux does not call into question the considerations by which the General Court dismissed the relevance of the alleged compensation mechanism.

[55] According to JCDecaux, the City of Brussels could at most have applied to the courts for the removal of the displays at issue and/or compensation. In addition, it could have charged JCDecaux the fee which it specifically introduced on 17 September 2001 for the occupancy of its public property for commercial purposes.

[56] JCDecaux points out, in that regard, that the development of sites in terms of logistics and town planning regulations has frequently made it necessary to find new locations.

JCDecaux could not, therefore, have prevented JCDecaux from installing and using different displays belonging to the City of Brussels. Lastly, JCDecaux observes that those contracts are fundamentally different in terms of the economic rationale behind them and their respective conditions. In its view, the General Court was not entitled to 'hypothetically assume' that, had it removed the displays at issue on the expiry dates stipulated in Annex 10, it would have installed in the same locations an identical number of displays covered by the 1999 contract and would have paid the City of Brussels rent and taxes corresponding to significantly different services governed by the latter contract. In the reply, JCDecaux adds that it is clear from the Commission's line of argument in its response that the judgment under appeal is vitiated by contradictory reasoning in so far as it cannot be claimed simultaneously that the displays installed under the 1984 contract are subject to a different legal regime from that of the 1999 contract and that they should have been subject to the payment of rent and taxes stipulated in the latter contract.

53. By the second part, JCDecaux submits that, in paragraphs 53, 54 and 56 of the judgment under appeal, the General Court distorted the legal regime applicable to the taxation of the use of the displays at issue which were kept in place beyond the expiry dates stipulated in Annex 10.

54. In that regard, first, JCDecaux asserts that the General Court adopts 'an unjustified interpretation of the legal framework' in order to conclude, in paragraph 54 of the judgment under appeal, that the Commission did not commit an error of assessment by taking the tax regulations of the City of Brussels cited in paragraph 56 of that judgment as the reference system, basing that conclusion on the fact that, during the pre-litigation procedure, the Belgian authorities did not dispute that those tax regulations constituted the reference tax system for taxing the use of advertising displays in the territory of the City of Brussels. The General Court thus failed to take account of the fact that the municipalities enjoy fiscal autonomy, enshrined in Article 170(4) of the Belgian Constitution,[57] and that there was therefore no uniform system of taxation in the national territory or even in the territory of the Brussels-Capital Region. Moreover, the City of Brussels did not adopt advertising tax regulations until 2001. JCDecaux infers from this that the General Court could not consider that only the tax regulations of that city referred to by the Commission constituted a reference system, especially since it is apparent from two judgments of the tribunal de première instance francophone de Bruxelles (Brussels Court of First Instance (French-speaking)) of 4 November 2016[58] that the advertising displays covered by the 1999 contract should be exempt from advertising tax.

55. Secondly, JCDecaux submits that the fact that it did not have to pay any tax for the displays it used for advertising purposes in the territory of the City of Brussels cannot constitute a selective advantage since, for several years, CCB did not have any similar displays subject to such a tax. It adds that, when CCB subsequently used similar displays in that territory, it challenged the lawfulness of the tax regulation of 15 December 2008 before the Belgian courts, which declared it unconstitutional and annulled the taxes levied on that competitor for 2009. It refers, in that regard, to a judgment of the cour d'appel de Bruxelles (Court of Appeal, Brussels) of 4 September 2018, the existence of which it had fortuitously discovered and which was upheld on appeal by a judgment of the Cour de cassation (Court of Cassation, Belgium) of 1 October 2021.[59]

[57] According to that provision, 'A charge or tax can only be introduced by the metropolitan districts, federations of municipalities or by the municipalities by a decision of their council'.

[58] Judgments of the tribunal de première instance de Bruxelles (Brussels Court of First Instance) of 4 November 2016 (RG 2012/9807/A + 2012/9808/A and RG 2012/14576/A and 2014/5965/A).

[59] Judgment No F.19.0012.F of the Cour de cassation (Court of Cassation) of 1 October 2021 (BE:CASS:2021:ARR.20211001.1F.7).

56. The Commission, first of all, contends that, by its arguments, JCDecaux is in reality seeking a re-examination of the facts, without demonstrating any distortion of the facts by the General Court. In any event, both parts of the second ground of appeal are unfounded. Thus, as regards the first part, the Commission acknowledges that the 1999 contract contains no provision for the automatic removal of the advertising displays covered by the 1984 contract. The displays installed under the 1984 contract and listed in Annex 10 remain subject to the provisions of that contract, even after the entry into force of the 1999 contract, but only until the removal dates specified in that annex. What the General Court stated in paragraph 29 of the judgment under appeal, which paragraphs 48 and 49 of that judgment clarified, is that JCDecaux should have paid rent for the use of the latter displays, as was the case in respect of the use of the displays covered by the 1999 contract. The conclusion in paragraph 30 of the judgment under appeal is therefore well founded. In drawing that conclusion, the General Court in no way considered that the displays at issue which were kept in place beyond the expiry dates stipulated were *ipso facto* covered by the legal regime of the 1999 contract. As regards the second part, the Commission submits, first of all, that JCDecaux's argument based on Article 170(4) of the Belgian Constitution is inadmissible, since the interpretation of national law constitutes an assessment of a factual nature which falls within the exclusive jurisdiction of the General Court. Moreover, the Belgian authorities did not dispute, during the pre-litigation procedure, that the tax regulations of the City of Brussels constituted the reference system. Next, the Commission, referring to paragraph 63 of the judgment under appeal, states that it did not fail to take account of the two judgments of the tribunal de première instance francophone de Bruxelles (Brussels Court of First Instance (French-speaking)) of 4 November 2016, but that it disregarded their relevance for the analysis of the concept of 'State aid', since they related to street furniture covered by the 1999 contract and belonging to the City of Brussels. Lastly, it argues that the fact that CCB benefited from a tax exemption in other Belgian municipalities is irrelevant for the purposes of analysing the economic advantage enjoyed by JCDecaux.

*Assessment*

57. In addition to what has already been stated in point 42 of this Opinion, the Court of Justice has specified that the appraisal of the facts and the assessment of the evidence do not, save where the facts and evidence are distorted, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal and that there is such distortion where, without recourse to new evidence, the assessment of the existing evidence is clearly incorrect. Such 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. [60] There will also be distortion where the General Court has manifestly exceeded the limits of a reasonable assessment of the evidence. [61]

58. In the present case, by the first part, JCDecaux submits that the General Court's conclusion, in paragraph 30 of the judgment under appeal, that 'the fact that [JCDecaux] continued to use certain displays listed in Annex 10 under the conditions laid down by the 1984 contract after the expiry dates stipulated in that annex enabled it to avoid installing and using new displays covered by the 1999 contract and, consequently, to avoid paying the rent and taxes which it should have paid under that contract', is based on a manifest distortion of the facts and the applicable legal framework. It is apparent from paragraph 30 that that conclusion is based on the three-step reasoning the General Court followed in paragraph 29 of the judgment under appeal.

[60] Judgment of 23 March 2023, *PV* v *Commission* (C-640/20 P, EU:C:2023:232, paragraphs 77 and 78 and the case-law cited).

[61] Judgments of 2 October 2014, *Strack* v *Commission* (C-127/13 P, EU:C:2014:2250, paragraph 79), and of 16 February 2017, *Hansen & Rosenthal and H&R Wax Company Vertrieb* v *Commission* (C-90/15 P, EU:C:2017:123, paragraph 48).

59. In that regard, first of all, I take the view that, contrary to what JCDecaux claims, the General Court did not distort the facts by finding, as a first step, in paragraph 29 of the judgment under appeal, that 'it is common ground between the parties that, after the conclusion of the 1999 contract, [it] could install and use street furniture in the territory of the City of Brussels only under the conditions laid down in that contract, according to which it had to pay rent and taxes'. On the contrary, various documents in the file clearly demonstrate that that finding is well founded. Thus, first, as I shall explain in point 60 of this Opinion, after the expiry dates set out in Annex 10, the 1984 contract ceased to apply. Second, from 1999 onwards, the installation and use of new displays in the territory of the City of Brussels could take place only under the scheme provided for in the 1999 contract. In that regard, it is relevant to observe that, as the Commission pointed out at the hearing, Article 1(g) of the special tender specifications [62] provided for the successful tenderer – in the present case JCDecaux – to have exclusive rights to use advertising displays in the City of Brussels for the entire duration of that contract. Only the scheme provided for in that contract could therefore be applied.

60. Next, I consider that JCDecaux does not demonstrate that the second step of the General Court's reasoning, in paragraph 29 of the judgment under appeal, according to which it is apparent from 'Annex 10 [that], by derogation from the terms of the 1999 contract, [it] could continue to use the displays listed in that annex under the conditions laid down in the 1984 contract, namely without paying any rent or tax, but only until the expiry dates stipulated in that annex', is based on a manifestly incorrect assessment of the facts or the evidence. It follows from JCDecaux's arguments that it disputes that finding only in so far as, in its view, the displays listed in Annex 10 remained subject to the 1984 contract until they were actually removed, even if that occurred after those expiry dates. As the Commission rightly points out, there is no evidence in the file to support, let alone manifestly support, such an argument. On the contrary, some of the documents in the file directly contradict it. In its judgment of 29 April 2016, the cour d'appel de Bruxelles (Court of Appeal, Brussels) held that JCDecaux's use of the displays at issue beyond their respective expiry dates had taken place without right or title, which, in my view, precludes, in principle, that such use could have been governed by the 1984 contract. It furthermore seems to me that, although Annex 10 provided for a specific expiry date for each of the displays listed therein, that was because, by that date at the latest, each of the displays concerned had to be removed from its location from which point in time, the provisions of the 1984 contract no longer applied to those displays. In other words, it was only until those expiry dates that the displays listed in Annex 10 could coexist with those put in place under the 1999 contract without the contractual terms applicable to the first displays being amended by it. That view, far from being contrary to the 'basic principles of contract law', as JCDecaux contends, appears to me, in reality, to be the only solution which is consistent with those principles.

61. Lastly, I am of the opinion that JCDecaux also fails to establish that the General Court, in stating, in a third step, in paragraph 29 of the judgment under appeal, that, after the expiry dates stipulated in Annex 10, the displays listed in that annex 'were to be replaced by new displays covered by the 1999 contract, and would therefore be subject to the obligation to pay taxes and rent', made a manifestly incorrect assessment of the evidence. In my view, what the General Court intended to express by those comments was simply that, after those dates, JCDecaux was required, first, to have removed the displays listed in Annex 10 and, secondly, to have installed new displays in accordance with the terms of the 1999 contract. In the latter regard, I note that it is apparent from the purchase order which forms part of the 1999 contract that JCDecaux had

[62] Which reads as follows: 'During the period of validity of the contract, the contracting authority undertakes not to commission or authorise services relating to furniture equipped with advertising media, which are identical or similar to those described in these special tender specifications, by other contractors or by its own services, throughout its territory'.

undertaken to 'comply scrupulously with all market conditions', including the installation of 280 display panels for the entire territory of the City of Brussels and to do so 'within 8 calendar months following receipt of the purchase order'. Contrary to what JCDecaux claims, I do not believe that the General Court nevertheless considered that JCDecaux was under an obligation to replace each of the displays at issue 'automatically' and 'location by location' by an equivalent number of displays covered by the 1999 contract.[63] The Commission did not moreover rely on such an assumption in the contested decision.

62. I consider that the General Court's conclusion in paragraph 30 of the judgment under appeal, and reproduced in point 58 of this Opinion, is merely the logical consequence of the considerations set out in points 59 to 61 of this Opinion and cannot therefore be regarded as being based on a manifestly incorrect assessment of the facts or the evidence. In my view, and contrary to what JCDecaux claims, where the General Court states in paragraph 30 of the judgment under appeal that JCDecaux had thus been able to avoid paying the rent and taxes which it should have paid under the 1999 contract, it did not hold that the displays at issue which were kept in place and used after the expiry dates stipulated in Annex 10 were '*ipso facto*' covered by the rules of the 1999 contract. As the Commission explained in its written submissions before the Court and at the hearing, from a legal point of view, those displays were not covered by either the 1984 contract or the 1999 contract. The fact remains that, as found inter alia by the Belgian courts, the displays at issue which were kept in place and used beyond their respective expiry dates were retained and used unlawfully. Faced with that factual situation, which enabled JCDecaux to generate significant advertising revenues without having to pay rent or taxes, it was for the Commission, in order to assess the existence of an advantage, to adopt a 'counterfactual scenario', as the Commission itself stated at the hearing.[64] In my view, the General Court did not manifestly exceed the limits of a reasonable assessment of the facts and evidence in validating, in that regard, the 'scenario' the Commission adopted consisting in applying, by reference, the rules in force at the material time, namely the legal regime of the 1999 contract. I point out that, with regard to the exclusivity clause contained in that contract, that was the only regime applicable to the use, for advertising purposes, of displays of the type in question on public property in the City of Brussels.

63. I would add that, as the Commission and CCB pointed out at the hearing, the fact that, under the 1999 contract, unlike the 1984 contract, ownership of the street furniture is transferred to the City of Brussels is not in itself decisive as regards the question of the payment of rent. The rent in the present case is not for the rental of the street furniture as such, but for the use of display panels for advertising purposes on public property.[65]

64. The second part is directed against paragraphs 53, 54 and 56 of the judgment under appeal and alleges that the General Court distorted the legal regime applicable to the establishment of the reference system and the taxation of the use of the displays at issue.

[63] I observe that the purchase order also stipulates that, 'where existing furniture is to be replaced by a new model of bus shelter or with a display panel, [JCDecaux has undertaken] to carry out the replacement works within a period of 48 to 72 hours depending on the weather conditions'. Attached to that purchase order is an annex containing 'detailed lists of the locations of the existing bus shelters and display panels, with a view to enabling [JCDecaux] to draw up [its] installation proposal, taking into account the location of the existing furniture and the removal dates for the displays in place'.

[64] See paragraph 67 of the Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU: 'To assess [whether or not there is an advantage], the financial situation of the undertaking following the measure should be compared with its financial situation if the measure had not been taken'.

[65] At the hearing, CCB stated, without being contradicted by JCDecaux, that JCDecaux used displays installed on street furniture which it owned in the neighbouring municipality of Uccle (Belgium) for advertising purposes and paid rent for that use.

65. As a preliminary point, I observe that, as was already the case before the General Court, it is not clear from the line of argument JCDecaux puts forward in support of that second part whether it challenges the findings relating to the existence of an economic advantage, or those relating to the selective nature of the measure.[66] Assuming that the second hypothesis should be accepted, it seems to me that the conclusion, in paragraph 53 of the judgment under appeal, that JCDecaux's argument must be rejected, since, in the case of an individual measure, the selectivity of the economic advantage is presumed, remains entirely well founded.[67] The present case involves individual aid and not a general aid scheme.

66. In any event, I consider that it is not obvious from any of the evidence JCDecaux adduced that, in the contested paragraphs of the judgment under appeal, the General Court distorted the content of the relevant national law or arrived at findings or assessments that were manifestly at odds with the content of that law.

67. As regards paragraph 54 of the judgment under appeal, it does not appear to follow from JCDecaux's argument that it calls into question as such the General Court's finding that the Belgian authorities did not dispute, during the pre-litigation procedure, that the tax regulations of the City of Brussels constituted the reference tax system. In any event, I am of the opinion that, in endorsing the Commission's position which used those tax regulations as the reference system, the General Court did not make an assessment which was manifestly at odds with the content of Article 170(4) of the Belgian Constitution. Although, admittedly, that provision enshrines the fiscal autonomy of municipalities in Belgium, with the result that the system for taxing the use of advertising displays may vary from one municipality to another, I fail to see how this could prevent the Commission from taking into account, in order to establish the existence of an advantage in the present case, only the tax legislation applicable in the territory of the City of Brussels.

68. As regards JCDecaux's argument based on the two judgments of the tribunal de première instance francophone de Bruxelles (Brussels Court of First Instance (French-speaking)) of 4 November 2016, I share the Commission's view that, in paragraph 63 of the judgment under appeal, the General Court does not disregard those judgments, but dismisses their relevance in respect of the classification of the measure at issue as State aid. In those judgments, the tribunal de première instance francophone de Bruxelles (Brussels Court of First Instance (French-speaking)) held that JCDecaux was not liable for the tax on advertising displays provided for in the tax regulations of 20 December 2010 and 5 December 2011 since the first indent of Article 9 of those tax regulations exempted from that tax advertising displays belonging to the City of Brussels. Although the displays covered by the 1999 contract were indeed the property of the City of Brussels, the same could not be said of those covered by the 1984 contract, which JCDecaux owned. As regards the displays at issue which JCDecaux kept in place and continued to use after the expiry dates stipulated in Annex 10, they remained in its ownership but, as stated in point 60 of this Opinion, their use was no longer governed by the 1984 contract. As soon as those expiry dates had passed, they became subject to the tax regulations adopted by the City of Brussels as from 2001. The General Court cannot therefore be accused of any manifest distortion of the applicable national legislation or of the national case-law relating thereto.

[66] In its defence before the General Court, the Commission had already made such a comment. JCDecaux's response, in its reply, was that its arguments did not relate to the selective nature of the measure and that, by the application, it '[disputed] simply and clearly the relevance of the Commission's use of the 2001 tax regulation on the city's advertising displays in order to establish the existence of an advantage in favour of JCDecaux (*quod non*) and as a basis for calculating the amount of any aid to be recovered by the Belgian State'.

[67] Judgment of 4 June 2015, *Commission* v *MOL* (C-15/14 P, EU:C:2015:362, paragraph 60).

69. Lastly, I also agree with the Commission when it submits that the fact that, for several years, CCB was not subject to the payment of tax on the advertising displays it used in the territory of other municipalities is irrelevant to the analysis of the advantage for the purposes of Article 107(1) TFEU enjoyed by JCDecaux. In other words, it is not because CCB benefited, in any event, from a tax exemption in municipalities other than the City of Brussels that the tax exemption granted to JCDecaux in that city should escape classification as State aid. The fact that the General Court did not expressly discuss that issue in the judgment under appeal is not sufficient to demonstrate the existence of a manifest distortion of the facts or of the applicable legal framework. Nor can such a distortion consist of the fact that the General Court did not take account of the judgment of the cour d'appel de Bruxelles (Court of Appeal, Brussels) of 4 September 2018, confirmed on appeal by a judgment of the Cour de cassation (Court of Cassation) of 1 October 2021, since it is not apparent from the file that those judgments were brought to its attention during the proceedings before it.

70. In the light of the foregoing, the second ground of appeal must, in my view, also be rejected as unfounded.

## Conclusion

71. In the light of all the foregoing considerations, I propose that the Court dismiss the appeal in its entirety and, in accordance with Article 184(1) of the Rules of Procedure of the Court of Justice, order JCDecaux Street Furniture Belgium to pay the costs incurred by the European Commission. Clear Channel Belgium, the intervener at first instance, took part in the oral part of the proceedings before the Court, but has not applied for JCDecaux to pay the costs. In those circumstances, in accordance with Article 184(4) of the Rules of Procedure of the Court, it should be ordered to bear its own costs relating to this appeal.