



## Reports of Cases

OPINION OF ADVOCATE GENERAL  
SHARPSTON  
delivered on 8 May 2018<sup>1</sup>

**Case C-114/17 P**

**Kingdom of Spain**

**v**

**European Commission**

(Appeal — Aid for the deployment of digital terrestrial television in remote and less urbanised areas of Comunidad Autónoma de Castilla-La Mancha — Subsidies granted to operators of digital terrestrial television platforms — Decision declaring the aid incompatible in part with the internal market — Adoption by the Commission of an amending decision — New pleas — Amendment of a form of order sought — Right of the Member State concerned to be heard before the adoption of that amending decision)

1. In this appeal Spain asks the Court to set aside in its entirety the judgment of the General Court in *Spain v Commission*,<sup>2</sup> in which the General Court rejected Spain's action for annulment of Commission Decision C(2014) 6846.<sup>3</sup> In support of its appeal Spain argues, in particular, that the Commission acted in breach of its right to be heard when it adopted Decision C(2015) 7193<sup>4</sup> amending Decision C(2014) 6846.

2. The Court here has the opportunity to develop its case-law concerning the extent of the European Commission's obligation to hear the Member State concerned by State aid review proceedings before it adopts a decision *amending* its prior decision concerning the same State aid. The Court's judgment here may well provide useful guidance for Case C-56/18 P *Commission v Gmina Miasto Gdynia and Port Lotniczy Gdynia Kossakowo*,<sup>5</sup> pending before the Court.

3. As a preliminary point however, the Court will have to clarify the conditions under which it is admissible to raise, in an action for annulment brought against a Commission State aid decision, arguments directed against an act amending such a decision. To that end, the Court will have to elucidate the meaning of and the relationship between Articles 84 and 86 of the Rules of Procedure of the General Court.

<sup>1</sup> Original language: English.

<sup>2</sup> Judgment of 15 December 2016, T-808/14 ('the judgment under appeal'), not published, EU:T:2016:734.

<sup>3</sup> Commission Decision C(2014) 6846 on State aid SA.27408 (C 24/10) (ex NN 37/10, ex CP 19/09) implemented by the authorities of Castilla-La Mancha for the deployment of digital terrestrial television in remote and less urbanised areas ('Decision C(2014) 6846' or 'the initial decision').

<sup>4</sup> Commission Decision C(2015) 7193 of 20 October 2015 correcting certain errors in Commission Decision C(2014) 6846 ('Decision C(2015) 7193' or 'the amending decision'). The amended version of Decision C(2014) 6846 was published in OJ 2016 L 222, p. 52, on 17 August 2016. The amending Decision C(2015) 7193 was not subject to separate publication.

<sup>5</sup> In that case, it appears that the Commission omitted to hear the Member State concerned before adopting a decision *replacing* its prior State aid decision.

## Legal background

### *Rules of Procedure of the General Court*

4. In accordance with Article 84 of the Rules of Procedure of the General Court, a new plea in law may be introduced in the course of proceedings only if it is based on matters of law or of fact which come to light in the course of the procedure. The party concerned must introduce such a plea as soon as those matters come to its knowledge.

5. Article 86(1) states 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 ... modify the application to take account of that new factor’. Article 86(2) provides that ‘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’. Article 86(4) requires that the statement of modification contain the modified form of order sought and, where appropriate, the modified pleas in law and arguments.

### *Regulation 2015/1589*

6. Pursuant to Article 15(1) of Regulation (EU) 2015/1589,<sup>6</sup> the examination of possible unlawful aid may result in a decision to open the formal investigation procedure. Such procedure, if opened, should be closed by means of a decision adopted pursuant to Article 9. In accordance with Article 9(8), before adopting a decision, the Commission should give the Member State concerned an opportunity to submit its observations *on the information* received by the Commission in the course of the investigation.

7. Article 11, applicable to such a procedure by virtue of Article 15(3), allows the Commission to revoke any such decision, where information which was a determining factor for that decision was incorrect. Article 11 requires the Commission, before such a revocation and before adopting a new decision, to open a formal investigation and to give the Member State concerned the opportunity to submit its comments.

## Facts and procedure before the General Court

8. Between 2005 and 2008, Spain adopted a series of measures in order to support the deployment of a digital terrestrial system for television distribution in remote and less urbanised areas of its territory, in particular in Castilla-La Mancha.

9. Following complaints received from two television operators, by letter of 29 September 2010, the Commission informed Spain that it had decided to initiate a formal investigation procedure in respect of those measures. In the course of that procedure, the Commission received comments from the interested parties and transmitted them to Spain for comments. Spain submitted its comments on several occasions.

<sup>6</sup> Council Regulation of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ 2015 L 248, p. 9). Recitals 17 and 18 stress the rights of the Member State concerned to participate in, and be heard during, the proceedings.

10. On 1 October 2014, the Commission adopted Decision C(2014) 6846 concerning the aid granted in the territory of Castilla-La Mancha.<sup>7</sup>

11. The first subparagraph of Article 1 of that decision stated that the aid granted to two television operators, Telecom CLM and Abertis, to upgrade their transmission centres, to build new transmission centres and to supply, operate or maintain digital services in Area II of Castilla-La Mancha had been implemented by Spain in breach of Article 108(3) TFEU and was incompatible with the internal market. The second subparagraph of Article 1 repeated that conclusion with respect to Hispasat, a broadcaster of satellite signals, to install satellite receivers to transmit signals in that area. Article 3(1) required Spain to recover the aid thus defined from those three operators.

12. On 12 December 2014, Spain brought an action before the General Court for annulment of Decision C(2014) 6846.<sup>8</sup>

13. On 23 January 2015, Hispasat brought an action before the General Court to annul that decision.<sup>9</sup> In its application, it claimed that it had never received any aid from Spain or its local authorities.

14. Meanwhile, in the context of implementing Decision C(2014) 6846, Spain and the Commission disagreed as to whether the cost of the digital equipment (acquired by the local authorities in Castilla-La Mancha with a view to transmitting the television signal) fell within the scope of that decision and thus whether Spain had to recover it from the operators concerned.

15. On 20 October 2015, the Commission adopted Decision C(2015) 7193 amending Decision C(2014) 6846. In the introductory part of that decision, it stated that that amendment was intended to correct errors concerning Hispasat. The amending decision removed Hispasat from amongst the beneficiaries of the State aid.<sup>10</sup> It also replaced the term ‘supply of digital services’ in the first subparagraph of Article 1 of the initial decision with ‘supply of digital equipment’.<sup>11</sup>

16. By letter lodged with the General Court on 23 December 2015, Spain put forward a new plea in law in the proceedings pending in Case T-808/14 (‘Spain’s new submissions’). It argued that the amending decision went beyond the stated objective of removing Hispasat from the scope of the initial decision and substantially extended the scope of the aid to be recovered by including the aid granted for the supply of the equipment (EUR 32.5 million). Spain claimed that in doing so the Commission had infringed the principle of legal certainty.

17. The Commission submitted its observations on 28 January 2016. It argued that the amending decision constituted a mere corrigendum of the initial decision and did not impose any new obligations on Spain. It added that Spain’s new submissions were inadmissible as they did not go beyond the arguments earlier invoked by Spain in support of the plea of the alleged breach of legal certainty.

18. By order in *Hispasat v Commission*,<sup>12</sup> the General Court held that following the amendment of Decision C(2014) 6846, that case had become devoid of purpose and that accordingly there was no further need to adjudicate on Hispasat’s application.

<sup>7</sup> It also adopted a separate decision with regard to the rest of the territory of Spain. See Commission Decision of 19 June 2013 on state aid SA.28599 (C 23/2010 (ex NN 36/2010, ex CP 163/2009)) implemented by the Kingdom of Spain for the deployment of digital terrestrial television in remote and less urbanised areas (outside Castilla-La Mancha) (OJ 2014 L 217, p. 52).

<sup>8</sup> The case was registered under number T-808/14.

<sup>9</sup> The case was registered under number T-36/15.

<sup>10</sup> In order to achieve that result, it repealed the second subparagraph of Article 1 of the initial decision, deleted the reference to Hispasat in Article 3(1) and removed all the references to Hispasat from the preamble (recitals 44, 45, 108, 113, 115, 118, 130, 170 and 198 to 200).

<sup>11</sup> Emphasis added.

<sup>12</sup> Order of 14 January 2016, T-36/15, not published, EU:T:2016:73.

## The judgment under appeal and the appeal

19. In the judgment under appeal, the General Court held that all the pleas raised by Spain in its application were unfounded and accordingly dismissed the action in its entirety.

20. With regard to Spain's new submissions, it held that they were in reality directed against the amending decision and were therefore admissible.<sup>13</sup> Next, the General Court, acting on its own motion, held that by failing to afford Spain a possibility to lodge observations before the adoption of that decision, the Commission had infringed its right to be heard.<sup>14</sup> It also held that, since the initial decision had *ab initio* covered the aid for the supply of digital equipment, the amending decision did not impose any new obligation on Spain and, consequently, that that infringement was not such as to entail the annulment of the amending decision.<sup>15</sup> It therefore rejected the additional plea contained in Spain's new submissions.

21. By its appeal, Spain requests the Court of Justice to set aside the judgment under appeal, annul Decision C(2014) 6846 and order the Commission to pay the costs. It puts forward three grounds of appeal.

22. Spain submits, *first*, that the General Court erred in law in its interpretation of Article 1 of Decision C(2014) 6846 in its initial version and thus misconstrued the nature of the State aid measure granted by Spain and the notion of State aid within the meaning of Article 107 TFEU. It also erred in law by failing to state that the breach of Spain's right to be heard entailed an infringement of principles of good administration and legal certainty. *Second*, the General Court erred in law by holding that Spain had failed to respect the first and fourth conditions set out in *Altmark Trans and Regierungspräsidium Magdeburg*.<sup>16</sup> *Third*, the General Court infringed Article 107(3)(c) TFEU in finding that the aid granted by Spain was incompatible with the internal market on the grounds that that Member State favoured the terrestrial over the satellite technology of television distribution.

23. The Commission asks the Court to dismiss the appeal. In particular, it argues that even if the Court were to uphold the first ground of appeal, that could, at the most, result in the annulment of the amending decision, whilst the appeal seeks the annulment of the initial decision.

24. At the hearing on 7 March 2018, Spain and the Commission made oral submissions.

25. As requested by the Court, I shall limit myself in this Opinion to examining the first ground of appeal.

## Assessment

### *Admissibility of the first ground of appeal*

26. A natural reading of the first ground of appeal suggests that its subject matter is the initial decision. It challenges the General Court's interpretation of Article 1 of that decision in the version preceding the adoption of the amending decision. However, the arguments put forward in support of the first ground of appeal challenge the General Court's findings concerning the validity of the procedure used to adopt the *amending* decision.

<sup>13</sup> Paragraphs 34 to 37.

<sup>14</sup> Paragraphs 41 to 46.

<sup>15</sup> Paragraphs 47 to 49.

<sup>16</sup> Judgment of 24 July 2003, C-280/00, EU:C:2003:415.

27. The application that Spain lodged with the General Court preceded the *amending* decision and could be directed only against the *initial* decision. The form of order sought in the appeal expressly mentions the annulment of the judgment under appeal and of the *initial* decision, but not that of the *amending* decision. At the hearing, counsel for Spain claimed that, by submitting the new plea, Spain had sought to extend the subject matter of the proceedings with a view to seeking the annulment of the ‘initial decision as amended’.

28. That being so, I shall examine, as a preliminary point, whether the *amending* decision falls within the scope of the present proceedings and, consequently, whether the Court is competent to examine Spain’s arguments pertaining to that decision.<sup>17</sup>

*Whether the subject matter of the proceedings covers ipso facto the amending decision as of the date of its adoption*

29. Can it be argued that the subject matter of the proceedings *ipso facto* covered the amending decision as of the day of the latter’s adoption?

30. The Commission argues that the effects of the amending decision do not go beyond simple rectification of clerical errors and obvious inaccuracies in the initial decision.

31. If the Commission were right, the amending decision would be deprived of any autonomous legal effects and would not be ‘intended to produce legal effects vis-à-vis third parties’ within the meaning of Article 263 TFEU. Accordingly, it could not be subject to a separate action for annulment.

32. I think that, had that been the case, the amending decision could be viewed, for the purposes of an action for annulment, as ‘merging’ with the initial decision and thus constituting an indivisible whole with it. Spain’s application and its appeal could then indeed be considered as being directed *ipso facto* against the initial decision ‘as rectified’ without it being necessary to modify the initial form of order sought.

33. Whilst some amendments indeed constitute simple rectifications of the text of the initial decision,<sup>18</sup> others appear to go beyond that threshold and affect the substance of that decision.<sup>19</sup>

34. That is beyond any doubt the case as regards the deletion of all the references to Hispasat. The result of that amendment was to exclude Hispasat from the category of beneficiaries of the State aid at issue.<sup>20</sup>

35. On a natural reading, replacing the term ‘services’ in the first subparagraph of Article 1 of the initial decision with the term ‘equipment’ also affects the substance of the initial decision. To say the least, those terms do not appear to be synonyms.

<sup>17</sup> That being a matter of public policy, the Court should examine that question *ex officio* despite the fact that none of the parties raised it (see, to that effect, judgments of 12 November 2015, *Elitaliana v Eulex Kosovo*, C-439/13 P, EU:C:2015:753, paragraphs 37 and 38, and of 26 February 2015, *Planet v Commission*, C-564/13 P, EU:C:2015:124, paragraph 20).

<sup>18</sup> Recitals 98, 131, 132, 146 and 165 rectify cross-references appearing in the text.

<sup>19</sup> Here, the parties fundamentally disagree. The correct interpretation of the decision at issue is a question of law. The argument by which Spain challenges the interpretation of Article 1 of the initial decision retained by the General Court is thus admissible at the appeal stage (see, to that effect, judgment of 6 October 2015, *Commission v Andersen*, C-303/13 P, EU:C:2015:647, paragraph 74).

<sup>20</sup> In the initial decision, instead of defining the potential beneficiaries in general and abstract terms, the Commission opted for identifying all the actual beneficiaries. Removing Hispasat from that category has obvious implications for the legal situation not only of Spain, as it affects the scope of its obligation to recover the aid granted, but also of that beneficiary, whom the initial decision concerned directly and individually, whilst the amending decision does not.

36. The *form* of the amending decision corroborates the impression that its content is not limited to mere rectifications. At the hearing, counsel for the Commission explained that the amending decision was adopted by the College of Commissioners. He explained that that is the procedure followed where the Commission adopts substantive State aid decisions, whilst purely rectifying decisions are adopted by the Secretary-General of the Commission. He admitted that the choice of procedure in this case had been motivated by the fact that the amending decision substantially restricted the scope of the initial decision.

37. Ultimately, whether and to what extent the replacement of ‘services’ by ‘equipment’ constitutes a substantive modification of the scope of Spain’s obligation to recover the aid granted could be ascertained only by comparing the initial and the amended versions of Article 1, read in the light of the grounds given by the Commission in each decision. However, the amending decision fails to set out any grounds, which makes such an analysis (save in respect of Hispasat) close to impossible.<sup>21</sup>

38. On balance, it seems likely that the amending decision did produce autonomous legal effects substantially affecting the legal position of Spain as it stood at the time of the initial decision. If so, the amending decision would constitute a legal act that may be subject to a separate action for annulment. If Spain wished to extend the scope of its initial application to include the amending decision, it needed formally to modify that application.

39. I shall now examine whether Spain succeeded in doing so by lodging its new submissions with the General Court.

*Did Spain effectively extend the scope of its application?*

40. Article 76(d) of the Rules of Procedure of the General Court requires the applicant to specify in its application the subject matter of the proceedings. As a matter of principle, it is not permitted for a party to alter that subject matter during the proceedings; and the merits of an action must be examined solely in the light of the claims contained in the application initiating the proceedings.<sup>22</sup>

41. Articles 84 and 86 of the Rules of Procedure of the General Court provide for two derogations to that rule. Article 84 applies where a new matter of law or of fact comes to light during the proceedings. Article 86 is significantly narrower in scope: it may be relied on only where the ‘new matter’ consists in replacing or amending the act at issue by another act having the same subject matter.

42. Whilst Article 84 allows the applicant only to introduce new pleas in law (together with arguments and evidence in their support), Article 86 is further reaching: it permits that party also to modify the subject matter of the application, that is, to reformulate the forms of order sought so as to challenge the new act in the pending proceedings.<sup>23</sup>

<sup>21</sup> I shall revert to this issue in points 67 to 69 below.

<sup>22</sup> See, to that effect, judgment of 11 November 2010, *Commission v Portugal*, C-543/08, EU:C:2010:669, paragraph 20 and the case-law cited.

<sup>23</sup> The rationale behind Article 86 is twofold: first, it would not be in the interests of a due administration of justice and the requirements of procedural economy to oblige the applicant to make a fresh application to the Court and thereby initiate separate proceedings; second, it would be inequitable if the author of the challenged act (here: the Commission) were able to amend the act challenged before the Court or to substitute another for it in order to frustrate the proceeding (see, to that effect, judgments of 3 March 1982, *Alphasteel v Commission*, 14/81, EU:C:1982:76, paragraph 8, and of 14 July 1988, *Stahlwerke Peine-Salzgitter v Commission*, 103/85, EU:C:1988:398, paragraph 11). Article 86 constitutes a codification of that case-law developed, most recently, in the context of disputes concerning restrictive measures adopted by the Council and the Commission in the area of the Common Foreign and Security Policy of the European Union. See, as an example of that case-law, judgment of 6 October 2015, *Chyzh and Others v Council*, T-276/12, not published, EU:T:2015:748, paragraph 26.

43. The introduction of Article 86 to the Rules of Procedure in 2015 implied an increase in the requisite level of formality.<sup>24</sup> Thus, paragraphs 2 and 4 of Article 86 require expressly that such a modification be made in a written submission that contains the *modified form of order sought*.

44. The formal requirements set out in Article 86 do not, of course, apply for their own sake: they are intended to ensure the adversarial nature of proceedings and the sound administration of justice.<sup>25</sup>

45. Lodging a procedural document during proceedings before the General Court with a view to modifying the application is equivalent to bringing an action for annulment by means of an application.<sup>26</sup> Consequently, the settled case-law setting out the requirements as to the form and content of such an action applies by analogy.

46. It follows that a statement in modification must, in particular, set out unambiguously and in a sufficiently clear and precise manner the subject matter of the proceedings, the essential points of law and of fact on which a case is based and the heads of claim so that the Court does not rule *ultra petita* or fail to rule on a plea in law.<sup>27</sup>

47. Conversely, a submission containing new pleas or arguments, but not meeting all the requirements set out in Article 86 or in the case-law cited above, is not enough to modify effectively the subject matter of the case. It does not produce legal effects beyond those provided in Article 84, that is, raising new pleas or arguments with regard to *the same subject matter*.<sup>28</sup>

48. In the present case, little more than a year after adopting the initial decision and while the annulment proceedings against that decision were ongoing, the Commission adopted an act amending that decision (Decision C(2015) 7193). Spain thereupon lodged its new submissions with the General Court.

49. It is not contested that the subject matter of the amending decision was the same as the initial decision (State aid SA.27408). It follows that Article 86 was applicable.<sup>29</sup>

50. The General Court held, without any further explanation, that, since by its new submissions Spain challenged the *amending* decision, the new plea contained therein was admissible.<sup>30</sup>

51. I do not follow or accept the logic applied by the General Court.

52. The wording of Spain's new submissions suggests that Spain *did not intend* to challenge the amending decision, even if some of the arguments raised therein pertained to it. In the final paragraph of its new submissions, Spain expressly maintained the initial form of order sought, that is, the annulment of the *initial* decision.

24 The case-law preceding that provision, cited in the previous footnote, did not require much by way of formality. In particular, the applicant was allowed to amend its application at the hearing. See, for example, judgments of 6 September 2013, *Iran Insurance v Council*, T-12/11, not published, EU:T:2013:401, paragraph 35; of 12 May 2015, *Ternavsky v Council*, T-163/12, not published, EU:T:2015:271, paragraph 36; and of 5 October 2017, *Ben Ali v Council*, T-149/15, not published, EU:T:2017:693, paragraph 57.

25 Judgment of 9 November 2017, *HX v Council*, C-423/16 P, EU:C:2017:848, paragraph 23.

26 See, to that effect, judgment of 3 March 1982, *Alphasteel v Commission*, 14/81, EU:C:1982:76, paragraph 8. See also, as an example of a case where the General Court applied that case-law, order of 18 July 2016, *Arbuzov v Council*, T-195/16, not published, EU:T:2016:445, paragraph 20 and the case-law cited.

27 See, by analogy, judgments of 15 June 2010, *Commission v Spain*, C-211/08, EU:C:2010:340, paragraph 32, and of 14 November 2017, *British Airways v Commission*, C-122/16 P, EU:C:2017:861, paragraph 66.

28 Article 86 operates in this respect as a *lex specialis* to Article 84: where a party seeks to go further and to modify the scope of a dispute during the proceedings he must meet the stricter conditions set out in Article 86.

29 Article 86 entered into force on 24 April 2015 and is therefore relevant for the assessment of the effects of Spain's new submissions, lodged on 23 December 2015.

30 Paragraphs 36 *in fine* and 37 of the judgment under appeal.

53. The appeal appears to corroborate that: (i) the first ground of appeal concerns the interpretation of the *initial decision in its version before the amending* and (ii) the form of order sought expressly refers to the annulment of the *initial* decision.

54. I therefore do not think that the General Court could validly interpret and reclassify Spain's new submissions as being in reality intended to seek an annulment of the *amending* decision.<sup>31</sup>

55. The existence of an action for annulment and, likewise, of a statement that seeks to modify its scope can never be presumed and only the form of order expressly set out may be taken into consideration.<sup>32</sup> The substance of the application must be examined solely with reference to the order sought in the application or a statement seeking to modify it.<sup>33</sup> An action which does not contain any form of order sought is inadmissible.<sup>34</sup> I reject the suggestion made by Spain's counsel at the hearing that such an approach represents an excessive level of formality.

56. Next, I do not think that the General Court was required to request Spain to clarify whether its intention was to challenge the amending decision.<sup>35</sup> On the facts of the case, that would have been tantamount to inviting Spain to supplement an essential element of its action for annulment in breach of the time limit laid down in Article 263 TFEU.<sup>36</sup>

57. The case-law cited in points 45, 46 and 55 above does not furnish compelling reasons to justify lowering the admissibility requirements. Where, as in this case, an individual decision addressed to a Member State is notified to it, the latter has to bear the consequences of failing to specify within the prescribed period the form of order sought regarding that decision in proceedings before the General Court.<sup>37</sup>

58. It follows that Spain, despite having lodged its new submissions, failed to extend the subject matter of the proceedings.

### *Conclusion concerning the admissibility of the first ground of appeal*

59. It follows from the foregoing that the amending decision does not fall within the scope of the present proceedings. The first ground of appeal, relating to that decision, seeks therefore to extend the subject matter of the dispute. Pursuant to Article 170(1) of the Rules of Procedure of the Court, it is inadmissible at the appeal stage.<sup>38</sup>

31 See, by analogy, judgment of 13 December 2005, *Commission v Aktionsgemeinschaft Recht und Eigentum*, C-78/03 P, EU:C:2005:761, paragraph 45.

32 See, to that effect, judgment of 8 July 1965, *Krawczynski v Commission*, 83/63, EU:C:1965:70, paragraph 2.

33 See, by analogy, judgment of 25 September 1979, *Commission v France*, 232/78, EU:C:1979:215, paragraph 3.

34 Order of 12 February 2015, *Meister v Commission*, C-327/14 P, not published, EU:C:2015:99, paragraphs 14 to 16 and the case-law cited.

35 Unlike in *HX v Council* (judgment of 9 November 2017, C-423/16 P, EU:C:2017:848, paragraph 21). The facts of that case were, however, very different. Counsel for HX learned only at the hearing of the existence of the act (of general application) modifying the act contested in its application. He was induced to believe (by a version of the Rules of Procedure corresponding to the language of the case that was imprecise in its use of language) that no written statement was necessary to modify the form of order sought and therefore omitted to *confirm* in writing his wish to modify it, *expressed* earlier at that hearing. This Court held that the General Court was under an obligation to inform the applicant of his error and to place him in a position where he could rectify it.

36 The amending decision was adopted on 20 October 2015. Spain lodged its new submissions on 23 December 2015, that is, during the General Court's Christmas recess. The time limit had thus expired before the General Court could even resume its activities at the beginning of January 2016.

37 In her Opinion in *Splithoff's Bevrachtungskantoor v Commission* (C-635/16 P, EU:C:2018:28, point 67), Advocate General Kokott concluded that the fundamental right to effective judicial protection may be relied on in order to interpret extensively the *scope* of an application for annulment. The facts are different here and that right cannot be relied on in this case in order to mitigate the effects of Article 86.

38 See, to that effect, judgment of 21 September 2010, *Sweden and Others v API and Commission v API*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraphs 125 and 126.

60. I therefore suggest that the Court reject the first ground of appeal. I also suggest that the Court conclude that by extending the scope of dispute before it on the basis of Spain's new submissions, the General Court misconstrued the arguments put forward by Spain and, in consequence, erred in law by ruling *ultra petita*.<sup>39</sup> Since the General Court rejected those submissions on the substance, that error had no impact on the outcome of the case before it. Consequently, the judgment under appeal does not require to be set aside on that basis.

### ***Substance of the first ground of appeal***

#### *Commission's competence to adopt the amending decision and its obligation to state reasons*

61. If the Court disagrees with the analysis set out above, it will need to consider the lawfulness of the judgment under appeal inasmuch as it concerns the amending decision.

62. In that regard, I suggest that the Court should raise of its own motion and examine two fundamental questions. First, was the Commission competent to adopt the amending decision? Second, did the Commission respect the duty to state grounds of that decision?<sup>40</sup>

63. *First*, the General Court held that the Commission was competent to adopt that decision on the basis of Article 108(2) TFEU.<sup>41</sup>

64. I agree with that finding. By virtue of Article 108(2) TFEU, the Commission has the power not only to *rectify* decisions it has adopted pursuant to Article 9 of Regulation 2015/1589, as it frequently does without this principle being contested, or to *revoke* such a decision pursuant to Article 11 of that regulation. It also has the power substantively to *amend* such decisions, where it is necessary for the attainment of the objectives set out in the provisions of the Treaty referred to above.

65. The Commission may have a legitimate reason to do so, in particular, in order to take into account the evolution of the case-law of the EU Courts, or to correct its own errors,<sup>42</sup> as appears to have been the situation in the present case. Seen from that perspective, Article 11 is merely a specific expression of the powers conferred on the Commission by the Treaty to ensure that the State aid rules are applied correctly and effectively<sup>43</sup> and, thus, must not be interpreted *a contrario* as circumscribing those powers to the sole case (revocation) expressly mentioned.

66. Nothing in the Treaty suggests that Commission's competence is limited to decisions favourable to the Member States. Accordingly, it is immaterial whether the amending decision was favourable to Spain, as the Commission argues, or whether it imposed new obligations on that Member State, as the latter claims.

39 Judgment of 10 December 2013, *Commission v Ireland and Others*, C-272/12 P, EU:C:2013:812, paragraphs 27 and 28.

40 Both those questions constitute matters of public policy. The Court should raise and, if necessary, sanction them *ex officio* (see, concerning the competence of the author of the act at issue, judgment of 13 July 2000, *Salzgitter v Commission*, C-210/98 P, EU:C:2000:397, paragraph 56 and the case-law cited; and concerning the duty to state reasons, judgment of 2 December 2009, *Commission v Ireland and Others*, C-89/08 P, EU:C:2009:742, paragraph 34 and the case-law cited).

41 See paragraph 40 of the judgment under appeal.

42 See, to that effect, Heidenhain, M., *European State Aid Law Handbook*, Munich: Beck/Oxford: Hart, 2010, chapter 31, paragraph 58.

43 That objective is clearly stated in recital 21 of Regulation 2015/1589.

67. *Second*, whilst the General Court has not made any findings in that regard, I note that the amending decision fails to set out any grounds whatsoever for its adoption. That makes it close to impossible for this Court to examine, in particular, the nature of the amending decision<sup>44</sup> and its legal effects,<sup>45</sup> as well as to verify whether Spain was given an opportunity to comment — prior to its adoption — on all relevant information on which that decision was based.<sup>46</sup>

68. Accordingly, that absence of a statement of reasons in the amending decision impedes proper judicial review of its legality and thereby manifestly infringes Article 296 TFEU.

69. I conclude that the amending decision is vitiated by a manifest infringement by the Commission of its obligation to state reasons, that is, of an essential procedural requirement. That infringement alone is such as to entail its annulment.<sup>47</sup> By failing to conclude to that effect, the General Court erred in law. Accordingly, its judgment should be set aside with regard to the amending decision.

70. Only if the Court does not follow that suggestion will it have to examine the specific arguments that Spain raises in its first ground of appeal. I shall now turn to analyse them below.

#### *Article 107 TFEU and the principle of legal certainty*

71. As I understand the position, Spain submits that the General Court erred in interpreting Article 1 of the initial decision. In consequence, it allegedly failed to state that, by adopting a decision imposing additional obligations on Spain, the Commission infringed the very substance of the State aid measure granted by that Member State, misapplied the concept of State aid within the meaning of Article 107 TFEU and violated the principle of legal certainty.

72. The nature of the alleged unlawfulness is entirely unclear to me. Spain does not put forward any arguments in support of its claim. It does not explain which element of Article 107 TFEU was allegedly breached and in what manner. The same can be said of the argument concerning the alleged infringement of the principle of legal certainty.

73. It is settled case-law that such arguments are inadmissible.<sup>48</sup> Accordingly, I suggest that the Court should dismiss them as such.

#### *Whether Spain had the right to be heard prior to the adoption of the amending decision*

74. It appears from the file before the Court that, little more than a year after the date of the initial decision, the Commission adopted the amending decision. No decision to open or reopen the formal investigation procedure apparently preceded that latter decision.

75. On the one hand, it is not contested that Spain was given an opportunity to submit observations regarding all the elements of the Commission's administrative file prior to the adoption of the initial decision. On the other hand, it appears from the file that Spain was given no such opportunity after the adoption of the initial decision but prior to the notification of the amending decision.

<sup>44</sup> See point 37 above.

<sup>45</sup> See point 80 below.

<sup>46</sup> See points 86 to 89 below.

<sup>47</sup> See, to that effect, judgment of 17 May 1994, *France v Commission*, C-41/93, EU:C:1994:196, paragraph 37.

<sup>48</sup> See point 46 above and the case-law cited.

76. Spain submits that by introducing the notion of ‘supply of digital equipment’ into Article 1 of the initial decision, the amending decision extended the scope of the aid to be recovered and thus imposed new obligations on Spain. Since the Commission failed to afford it an opportunity to express its views before that decision was taken, Spain’s rights of defence were infringed. The Commission argues that the General Court was right to find, in the light of recitals 118 and 197 of the initial decision, that the aid granted for the supply of digital equipment was already included in its scope and that the amending decision therefore did not impose any new obligation. Since Article 41(2)(a) of the Charter of Fundamental Rights of the European Union<sup>49</sup> provides for a right to be heard only where an act adversely affects the rights of an individual and since the amending decision was favourable to Spain, the latter had no such right.

77. I shall examine in turn (i) whether, in these circumstances, Spain *had* the right to be heard; (ii) if so, whether the Commission *respected* that right; and (iii) what are the *consequences of a possible breach* of that right.

78. It is settled case-law that ‘observance of the right to be heard is, in all proceedings initiated against a person which are liable to culminate in a *measure adversely affecting* that person, a fundamental principle of EU law which must be guaranteed *even in the absence of any rules governing the procedure in question*’.<sup>50</sup>

79. Where there is any plausible doubt that an act is capable of adversely affecting the Member State concerned by the State aid review procedure, the Commission should give it an opportunity to be heard, be it only by way of precaution. The procedure to recover unlawful State aid is based on the principle of sincere cooperation of the Member State concerned with the Commission.<sup>51</sup> Where a decision the Commission intends to adopt is liable to affect the scope of a Member State’s obligation to recover the State aid at issue, the Commission should *a fortiori* afford that Member State an opportunity to comment.

80. Since there is no statement of reasons in the amending decision, it is difficult to ascertain whether the amending decision was favourable to Spain or imposed new obligations on it. If, as the Commission claims, the amendment of Article 1 did not affect the scope of that aid, it is legitimate to ask why the Commission bothered to amend it.

81. In any event, I have already concluded that, on balance, the amending decision probably did affect Spain’s legal position<sup>52</sup> and thus constituted an act open to challenge under Article 263 TFEU. Since by that decision the Commission maintained its classification of the measures granted by Spain as unlawful State aid, that decision constitutes an act affecting Spain adversely.<sup>53</sup> I have also drawn attention to the fact that the *procedure* used internally within the Commission to adopt the amending decision was that used to adopt substantive State aid decisions, *not* the lighter administrative procedure reserved for correcting mere clerical errors.<sup>54</sup> Finally, that decision was already liable to affect the scope of Spain’s obligation to recover the aid granted as regards Hispasat.

82. It follows that, as the General Court rightly held, Spain was in principle entitled to be heard before the Commission adopted the amending decision.

49 OJ 2010 C 83, p. 389 (‘the Charter’).

50 Judgment of 29 June 1994, *Fiskano v Commission*, C-135/92, EU:C:1994:267, paragraph 39 and the case-law cited (emphasis added).

51 Judgment of 18 October 2007, *Commission v France*, C-441/06, EU:C:2007:616, paragraph 28.

52 See point 38 above.

53 Had the Commission *revoked* the initial decision and *replaced* it with a new one, this could be seen at first glance. That the Commission chose a different technique and *amended* the initial decision to arrive at the same result cannot affect the classification of the amending decision as act affecting Spain adversely.

54 See point 36 above.

*Whether the Commission respected Spain's right to be heard*

83. The adoption of the amending decision cannot be considered in isolation. It marks the final point in the procedure initiated by the Commission's letter opening the formal investigation procedure, followed (after that investigation) by the adoption of the initial decision.

84. The purpose of the procedure by which full protection of the right to be heard is secured is satisfied if the party concerned was able to take cognisance of the relevant elements of the administrative file at *any stage* of the procedure preceding the adoption of the act at issue.<sup>55</sup> Once such a possibility has been afforded to that party, its right to be heard is, so to say, *exhausted*.

85. In particular, in the context of State aid review procedures, once the Commission has given the Member State concerned the possibility to comment on all the *elements on which its decision is (to be) based*,<sup>56</sup> it is not required, before it adopts a decision, to inform that Member State of the legal assessment that it intends to make,<sup>57</sup> to hear its views on such assessment,<sup>58</sup> or to inform it that that decision was imminent.<sup>59</sup> Likewise, before the adoption of a replacing or amending decision, the Commission is not required to repeat all the stages of the procedure set out in Regulation 2015/1589<sup>60</sup> and, in that context, submit the file to the Member State concerned for its observations.<sup>61</sup>

86. The proceedings in this case have not allowed the doubts as to whether the Commission relied on new or additional elements when adopting the amending decision to be dispelled.

87. If the Commission is right in claiming that the amending decision was based — over and above the elements contained in the administrative file at the time of the adoption of the initial decision — also on the information originating from Hispasat's application in Case T-36/15, Spain was not in a position to express its views in that regard. It did not intervene in Case T-36/15 and, thus, the written submissions exchanged between the parties in that case were not notified to it.

88. If, on the contrary, Spain is right in claiming that the amending decision was based on the information originating in the recovery proceedings, then, in principle, it cannot be ruled out that Spain was already aware of the essence of that information and that it was in a position to make known its views in the context of those proceedings.

89. The absence of a statement of reasons in the amending decision makes it close to impossible to ascertain which of the above is true.

<sup>55</sup> See, to that effect, Opinion of Advocate General Cosmas in *Germany v Commission*, C-288/96, EU:C:1999:239, point 62.

<sup>56</sup> See judgments of 15 November 2011, *Commission and Spain v Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P ('*Gibraltar*'), EU:C:2011:732, paragraphs 173 and 174, and of 16 December 2010, *Netherlands and NOS v Commission*, T-231/06 and T-237/06, EU:T:2010:525, paragraph 44. See also Hancher, L., Salerno, F.M., Schütte, M., 'The different stages in the State aid procedure', *State aid law of the European Union*, Oxford University Press, 2016, p. 372.

<sup>57</sup> Judgments of 24 November 2011, *Italy v Commission*, C-458/09 P, not published, EU:C:2011:769, paragraph 58, and *Gibraltar*, paragraph 177.

<sup>58</sup> Judgment of 21 January 1999, *Neue Maxhütte Stahlwerke and Lech-Stahlwerke v Commission*, T-129/95, T-2/96 and T-97/96, EU:T:1999:7, paragraphs 230 and 231.

<sup>59</sup> Judgment of 8 July 2004, *Technische Glaswerke Ilmenau v Commission*, T-198/01, EU:T:2004:222, paragraph 156.

<sup>60</sup> See, by analogy, judgment of 12 November 1998, *Spain v Commission*, C-415/96, EU:C:1998:533, paragraph 31. Depending on the legal effects of the changes that the new decision incorporates, it may be possible to dispense with the initiation of a formal investigation procedure. See to that effect, Heidenhain, M., *European State aid law Handbook*, Munich: Beck/Oxford: Hart, 2010, chapter 31, paragraph 58.

<sup>61</sup> Such an obligation would exist, in principle, had the initial decision been based on incorrect information (in such a case the Commission would, first, have to supplement the administrative file by conducting an additional investigation pursuant to Article 11 of that regulation) or had the legal framework evolved since submitting such observations (see judgment of 8 May 2008, *Ferriere Nord v Commission*, C-49/05 P, not published, EU:C:2008:259, paragraphs 68 to 71).

90. In such circumstances, the burden of proof should be on the Commission. The latter has never claimed that Spain was in a position to comment on the information that served as the basis for the amending decision in the context of the recovery proceedings, let alone adduced any evidence to that effect.

91. On that basis, I conclude that Spain was not given the opportunity to make known, in an effective way, its views on the truth and relevance of all the facts, charges and circumstances relied on by the Commission in support of its conclusion, in particular in Article 1 of the amending decision, that the infringement of EU law found in it had taken place and that the State aid defined therein should be recovered.

92. It follows that, inasmuch as the Commission based its amending decision on information on which Spain was not able to comment, it acted in breach of the right of that Member State to be heard and accordingly also of the principle of good administration.

#### *Consequences of a breach of Spain's right to be heard*

93. In paragraph 47 of the judgment under appeal, the General Court held that a procedural irregularity entails an annulment of the act concerned by it only if it is demonstrated that, were it not for that irregularity, the procedure would have led to a different result.<sup>62</sup> However, in the paragraphs that followed, it applied a different test, namely whether the amending decision imposed new obligations on Spain. On that basis, the General Court held that the breach of Spain's right to be heard did not entail the annulment of the amending decision. Spain challenged that reasoning. At the hearing, its counsel argued that an infringement of the right to be heard should *always* entail an annulment.

94. I cannot follow the reasoning of the General Court. I shall start my own analysis by recalling the relevant case-law.

95. On the one hand, the Court has held that failure to comply with an *essential* procedural requirement entails the annulment of the act vitiated by it.<sup>63</sup> In that context, I agree with Advocate General Fennelly that only the procedural requirements intrinsically linked to the formation and expression of the intention of the adopting authority are essential. Their observance is in the general interest.<sup>64</sup> Those requirements are so fundamental that *any* breach entails an annulment of the subsequent act, regardless of whether the outcome of the procedure might have been any different, had they been respected.<sup>65</sup>

96. On the other hand, the Court has likewise held that a breach of any other (non-essential) procedural formality justifies an annulment only if it can be demonstrated that, in the absence of such an irregularity, the proceedings could have led to a different result.<sup>66</sup>

<sup>62</sup> I note that only one of the judgments there cited by that court concerned the right to be heard: the others dealt with other (non-essential) procedural formalities.

<sup>63</sup> Judgment of 20 October 1987, *Spain v Commission*, 128/86, EU:C:1987:447, paragraph 25.

<sup>64</sup> See his Opinion in *Commission v ICI*, C-286/95 P and C-287/95 P, EU:C:1999:578, points 22 to 26.

<sup>65</sup> See, for example, judgment of 6 April 2000, *Commission v ICI*, C-286/95 P, EU:C:2000:188, paragraphs 42 and 52.

<sup>66</sup> Judgments of 29 October 1980, *van Landewyck and Others v Commission*, 209/78 to 215/78 and 218/78, EU:C:1980:248, paragraph 47 (alleged wrongful disclosure by the Commission of certain documents), and of 25 October 2005, *Germany and Denmark v Commission*, C-465/02 and C-466/02, EU:C:2005:636, paragraphs 36 and 37 (alleged absence of German-language version of a document during the proceedings). On the difference between those two categories of procedural irregularities, see Opinion of Advocate General Fennelly in *Commission v ICI*, C-286/95 P and C-287/95 P, EU:C:1999:578, points 27 to 29.

97. Even if the line of reasoning of the EU Courts has not always been unequivocal in that regard,<sup>67</sup> I am clear that the right of a Member State to be heard in the State aid procedure belongs to the first category.

98. I agree with Advocate General Mengozzi, who concluded that the obligation to consult the Member State concerned may ultimately be regarded as a specific expression of the allocation of powers between the institutions and the Member States or of the institutional (I would say ‘*constitutional*’) balance within the European Union.<sup>68</sup>

99. Thus, in the context of various different types of procedure, the Court has held that the right of the Member State concerned to be heard is an essential procedural requirement, the disregard of which *ipso facto* entails significant consequences. For example, a decision at issue may be annulled<sup>69</sup> or an infringement action brought following such a procedure may be declared inadmissible.<sup>70</sup>

100. The situation of a Member State concerned by a State aid review procedure is comparable to those referred to above.<sup>71</sup> That militates in favour of applying an analogous procedural rule in the present context, giving greater weight to the right to be heard, which is — after all — a fundamental right guaranteed by Article 47 of the Charter.

101. It is settled case-law that, having regard to the central role that the Member State concerned holds in the State aid review procedure,<sup>72</sup> where that Member State was not afforded an opportunity to comment on the observations submitted by interested third parties, the Commission *may not use them in its subsequent decision*.<sup>73</sup>

102. Thus, contrary to what the General Court held in paragraph 47 of the judgment under appeal, it should also be of little importance whether the Member State concerned succeeds in demonstrating that, *in concreto*, in the absence of a breach of that right by the Commission, the latter’s decision concerning the State aid would have been different.<sup>74</sup>

<sup>67</sup> I am not the first one to be confronted with that difficulty and to make an observation to that effect. See Opinion of Advocate General Mengozzi in *Bensada Benallal*, C-161/15, EU:C:2016:3, points 72 to 100 (in particular point 92) and the case-law cited. The EU Courts have consistently upheld the classification of the right to be heard as an essential procedural requirement (see, for example, judgments of 6 March 2003, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission*, T-228/99 and T-233/99, EU:T:2003:57, paragraph 141, and of 9 July 2003, *Vlaams Fonds voor de Sociale Integratie van Personen met een Handicap v Commission*, T-102/00, EU:T:2003:192, paragraphs 84 to 86). On several other occasions, the case-law has nevertheless referred to the need to demonstrate whether, had it not been for such an infringement, the outcome might have been different (see, for example, judgment of 8 July 2004, *Technische Glaswerke Ilmenau v Commission*, T-198/01, EU:T:2004:222, paragraph 203, upheld by the Court in appeal by judgment of 11 January 2007, *Technische Glaswerke Ilmenau v Commission*, C-404/04 P, not published, EU:C:2007:6, paragraph 131).

<sup>68</sup> See his Opinion in *Bensada Benallal*, C-161/15, EU:C:2016:3, point 82.

<sup>69</sup> See, in the context of a decision reducing the financial assistance from the European Social Fund, judgments of 7 May 1991, *Interhotel v Commission*, C-291/89, EU:C:1991:189, paragraph 17; of 4 June 1992, *Infortec v Commission*, C-157/90, EU:C:1992:243, paragraph 20; and of 25 May 1993, *IRI v Commission*, C-334/91, EU:C:1993:211, paragraph 25. See also, in the context of the review, pursuant to Article 106(3) TFEU, of special rights granted to undertakings entrusted with the operation of services of general economic interest, judgment of 12 February 1992, *Netherlands and Others v Commission*, C-48/90 and C-66/90, EU:C:1992:63, paragraphs 46 to 49.

<sup>70</sup> See, judgment of 14 April 2011, *Commission v Romania*, C-522/09, EU:C:2011:251, paragraph 16 and the case-law cited.

<sup>71</sup> In particular, it is settled case-law that that procedure *is merely a variant of the action for failure to fulfil obligations*, specifically adapted to the problems which State aid poses for competition in the internal market (see, for example, judgment of 3 July 2001, *Commission v Belgium*, C-378/98, EU:C:2001:370, paragraph 24 and the case-law cited). Likewise, the Court has expressly confirmed that the legal situation of the Member State concerned in an infringement procedure and in a procedure for adjustment of financial assistance is analogous (see, to that effect, judgment of 29 April 2010, *Commission v Germany*, C-160/08, EU:C:2010:230, paragraphs 41 and 42).

<sup>72</sup> See, for example, judgment of 29 June 2010 in *Commission v Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraph 57. The General Court has clearly explained the nature of those (bilateral) proceedings and the situation of the Member State concerned by them in its judgment of 6 March 2003, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission* (T-228/99 and T-233/99, EU:T:2003:57, paragraphs 140 and 141). Needless to say, the situation of a Member State is fundamentally different from that of any other party interested in such proceedings.

<sup>73</sup> See judgments of 24 September 2002, *Falck and Acciaierie di Bolzano v Commission*, C-74/00 P and C-75/00 P, EU:C:2002:524, paragraph 81, and of 29 June 2010, *Commission v Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraph 57.

<sup>74</sup> In my view, it cannot be a priori excluded that the arguments Spain might have put forward, had it been given an opportunity to do so, could have influenced the content of the amending decision.

103. Indeed, such a test is necessarily speculative and based on a number of assumptions. It is not clear what the requisite standard of proof would be and what degree of detail would be required in order to demonstrate the disparity between the actual and the hypothetical decision. I am persuaded that such a test cannot sensibly serve as a yardstick to assess whether the right of a Member State to be heard in State aid proceedings was respected.

104. Ultimately, it would require the Member State, and the Court, to place themselves in the position of the Commission in order to second guess whether the observations that that Member State would have submitted, had the Commission given it an opportunity to do so, would have altered the latter's assessment of the case. It is, I suspect, likely that the Commission would then argue in such a case that, in any event, the Member State's observations would not have changed its mind. That further undermines the objectiveness and thus the legitimacy of such a test.<sup>75</sup>

105. Rather, the Court should verify, as it has done on many occasions,<sup>76</sup> whether (objectively), before the Commission adopted its decision, the Member State concerned was given a genuine opportunity effectively to make known its views *on the documents obtained by the Commission to support its claim* that there has been an infringement of EU law as well as *on the observations submitted by the interested third parties*, which served as the basis for that decision.<sup>77</sup>

106. I conclude that the Commission's failure to comply with that obligation must entail the annulment of its decision ordering the aid concerned be abolished or altered, in so far as that decision was based on elements not submitted to the Member State concerned for observations.

107. In the light of the foregoing, contrary to what the General Court held in paragraph 48 et seq. of the judgment under appeal, whether or not the amending decision imposed new obligations on Spain is immaterial. Spain's argument that the General Court misconstrued Article 1 of the initial decision when comparing it with the amending decision is, thus, equally immaterial.

108. I have concluded earlier that by adopting the amending decision the Commission infringed Spain's right to be heard.<sup>78</sup> In the light of the foregoing considerations and on the assumption, *quod non*, that Spain's new plea is admissible, the nature of that infringement is such as to entail the annulment of that decision.

109. By failing to hold to that effect, the General Court erred in law. Accordingly, on that assumption the judgment under appeal should be set aside in so far as it concerns the amending decision.

<sup>75</sup> To accept such an argument would give rise to a further dilemma: is such a declaration binding on the Court? Or should it rather itself determine whether the Commission *should have altered* its stance in the light of Member State's observations? If so, on what criteria should such an assessment be based?

<sup>76</sup> In the context of State aid, the Court has effectively applied that more stringent standard (breach of right leads to automatic annulment) on many occasions (see, for example, judgments of 10 July 1986, *Belgium v Commission*, 234/84, EU:C:1986:302, paragraph 30; of 8 March 1988, *Exécutif régional wallon and Glaverbel v Commission*, 62/87 and 72/87, EU:C:1988:132, paragraphs 37 and 38; of 10 May 2005, *Italy v Commission*, C-400/99, EU:C:2005:275, paragraphs 29 to 34; and *Gibraltar*, paragraph 179). On several other occasions, despite *referring* to the additional requirement to demonstrate that the Commission's decision would have been different had the Member State had an opportunity to present its observations, the Court appears nevertheless to have *applied* that more stringent standard. In those cases, the right to be heard was not infringed *in practice* (either because the documents not submitted to the Member State concerned for observations did not contain any substantive elements or because the Commission's decision was not based on the information contained in those documents). Thus the Court could readily conclude that the procedural irregularities complained of *were not likely to have had any influence* on the outcome of the administrative procedure. My understanding is that that finding was a mere *consequence* of the compliance with the applicable standard rather than an additional self-standing *condition* of that compliance (see judgments of 11 November 1987, *France v Commission*, 259/85, EU:C:1987:478, paragraph 13; of 14 February 1990, *France v Commission*, C-301/87, EU:C:1990:67, paragraph 31; of 21 March 1990, *Belgium v Commission*, C-142/87, EU:C:1990:125, paragraph 48; and of 5 October 2000, *Germany v Commission*, C-288/96, EU:C:2000:537, paragraphs 99 to 106).

<sup>77</sup> See *Gibraltar*, paragraph 165 and the case-law cited. See also Dony, M., *Contrôle des aides d'État*, Éditions de l'Université de Bruxelles, 2006, p. 357.

<sup>78</sup> See point 92 above.

*Consequences of setting the judgment under appeal aside*

110. I have concluded that the General Court erred in law by failing to state that the amending decision is vitiated by two infringements (violation of the Commission's obligation to state reasons and violation of Spain's right to be heard) and that, if Spain's new plea is admissible, its judgment should be set aside for that reason.

111. Under Article 61 of the Statute of the Court of Justice, after having quashed the judgment of the General Court, the Court may itself give final judgment in the matter, if the state of the proceedings so permits, rather than refer the case back to the General Court for decision.

112. Since the infringements referred to above in themselves entail annulment of the amending decision, the Court may thus give final judgment.

113. I therefore suggest that, if it decides that the first ground of appeal is admissible, the Court should uphold that ground of appeal, set the judgment under appeal aside in so far as it concerns the Commission's amending decision and annul that decision.

**Costs**

114. Since the Court has asked me only to consider Spain's first ground of appeal alone and since the ultimate disposal of the appeal will depend on the position that the Court adopts not only in relation to that ground but also with regard to the second and third grounds of appeal, I make no recommendation as to costs in this case.

**Conclusion**

115. In the light of the foregoing, without prejudging the Court's assessment of the second and third grounds of appeal, I suggest that the Court should reject the first ground of appeal as inadmissible.

116. Alternatively, if it considers that ground admissible, the Court should uphold it, set the judgment under appeal aside in so far as it concerns the amending decision and annul that decision.