Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

26 November 2015*

(State aid — Digital television — Aid for the deployment of digital terrestrial television in remote and less urbanised areas in Spain — Decision declaring the aid compatible in part and incompatible in part with the internal market — Advantage — Service of general economic interest — Article 107(3)(c) TFEU — New aid)

In Case T-462/13,

Comunidad Autónoma del País Vasco (Spain),

Itelazpi, SA, established in Zamudio (Spain),

represented initially by N. Ruiz García, J. Buendía Sierra, A. Lamadrid de Pablo and M. Muñoz de Juan, and subsequently by J. Buendía Sierra and A. Lamadrid de Pablo, lawyers,

applicants,

v

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

defendant,

supported by

SES Astra, established in Betzdorf (Luxembourg), represented by F. González Díaz, F. Salerno and V. Romero Algarra, lawyers,

intervener,

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

THE GENERAL COURT (Fifth Chamber),

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

Registrar: J. Palacio González, Principal Administrator,

* Language of the case: Spanish.

having regard to the written procedure and further to the hearing on 12 March 2015,

gives the following

Judgment

Background to the dispute

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

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

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

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

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

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

4 By decision of 7 September 2007, the Spanish Council of Ministers adopted the National Plan for the Transition to Digital Terrestrial Television ('DTT') implementing the national technical plan provided for in Royal Decree 944/2005. That plan divided the Spanish territory into 90 technical transition projects and established a deadline for the switch-off of analogue broadcasting for each of those projects. The objective set in that plan was to achieve coverage of the Spanish population by DTT comparable with the coverage of that population by analogue television in 2007, that is to say, more than 98% of that population and 100% of the population of the Basque Country (Spain).

5 Since the coverage obligations laid down for DTT (see paragraph 2 above) were likely to lead to a lower coverage of the Spanish population than had been achieved by the pre-existing analogue broadcasting, it was necessary to ensure television coverage in Area II. The present case concerns only the public funding granted by the Spanish authorities to maintain the terrestrial digitisation process in that area, and more particularly the funding of that process within the regions of the Basque Country in that area. In the Basque Country, the proportion of the population in that area is 9.5%.

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

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

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

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

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

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

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

13 In the Basque Country, the first applicant, the Autonomous Community of the Basque Country (Spain), exercises its powers in a position of legislative and financial autonomy by reference to the Spanish State, in accordance with the Spanish Constitution and its Statute of Autonomy. Those powers cover, in particular, broadcasting and public services and infrastructures provided for in the Constitution and in the Statute of Autonomy in question. The deployment, maintenance and operation of the television networks were entrusted to the second applicant, Itelazpi, SA, a public undertaking wholly owned by the Basque Government, which had allocated funding to that undertaking to support the terrestrial digitisation process.

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

15 By letter of 29 September 2010 the Commission informed the Kingdom of Spain that it had decided to initiate the procedure laid down in Article 108(2) TFEU in respect of the aid in question for the whole territory of Spain, with the exception of the Autonomous Community of Castilla-La Mancha, for which a separate procedure was opened ('the decision to initiate the procedure'). By publication of the decision to initiate the procedure in the *Official Journal of the European Union* on 14 December 2010 (OJ C 337, p. 17), the Commission invited the interested parties to submit their observations.

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

'*Article 1*

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

Article 2

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

Article 3

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

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

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

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

Article 4

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

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

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

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

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

…

Article 5

This Decision is addressed to the Kingdom of Spain.'

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

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

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

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

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

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

Procedure and forms of order sought

23 By application lodged at the Court Registry on 30 August 2013, the applicants brought the present action.

24 By separate document, lodged at the Court Registry on the same date, the applicants submitted an application for interim relief, in which they submitted, in essence, that the President of the General Court should stay the enforcement of the contested decision. By order of 16 October 2013 in *Comunidad Autónoma del País Vasco and Itelazpi* v *Commission* (T-462/13 R, EU:T:2013:546), that application was dismissed and the costs were reserved.

25 By a document lodged at the Court Registry on 20 September 2013, the intervener sought leave to intervene in support of the form of order sought by the Commission. That application was granted by order of 10 February 2014 in *Comunidad Autónoma del País Vasco and Itelazpi* v *Commission* (T-462/13, EU:T:2014:81).

26 The intervener lodged its statement in intervention on 24 March 2014. By document lodged at the Court Registry on 24 April 2014, the applicants submitted their observations on that statement in intervention. The Commission did not submit observations on the intervener's statement in intervention.

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

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

29 By letter lodged at the Court Registry on 25 February 2015, the applicants submitted observations on the Report for the Hearing.

30 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 12 March 2015.

31 The applicants claim that the Court should:

— declare that the pleas in law are admissible and well founded;

— annul the contested decision;

— order the Commission to pay the costs.

32 The Commission contends that the Court should:

— dismiss the action;

— order the applicants to pay the costs.

33 The intervener claims that the Court should:

— make the form of order sought by the Commission;

— order the applicants to pay the costs relating to its intervention.

Law

34 By way of preliminary point, it should be observed that the action is admissible, although the applicants are not addressees of the contested decision, which, moreover, is not disputed by the Commission. As regards the first applicant, it is common ground that it took the decision to grant part of the aid at issue to the Basque Country. The contested decision, which prevents the first applicant from exercising its own powers, which it enjoys directly under Spanish law, as it sees fit, therefore has a direct and individual effect on its legal position (judgments of 8 March 1988 in *Exécutif régional wallon and Glaverbel* v *Commission*, 62/87 and 72/87, ECR, EU:C:1988:132, paragraphs 6 and 8; of 30 April 1998 in *Vlaamse Gewest* v *Commission*, T-214/95, ECR, EU:T:1998:77, paragraph 29; and of 9 September 2009 in *Diputación Foral de Álava and Others* v *Commission*, T-227/01 to T-229/01, T-265/01, T-266/01 and T-270/01, ECR, EU:T:2009:315, paragraph 76). As regards the second applicant, since the *locus standi* of the Autonomous Community of the Basque Country has been established, and since one and the same application is involved, there is no need to consider whether the second applicant is entitled to bring proceedings (see, to that effect, judgment of 24 March 1993 in *CIRFS and Others* v *Commission*, C-313/90, ECR, EU:C:1993:111, paragraph 31).

35 In support of the action, the applicants put forward three pleas in law. The first plea alleges infringement of Article 107(1) TFEU, in that the Commission erred in finding the existence of State aid. The second plea alleges an error of law in the analysis of the compatibility of the measure at issue with the internal market. By the third plea, the applicants claim that there has been an error of law in that the Commission found the existence of new aid.

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

36 This plea consists of two parts. The applicants take issue with the Commission for having infringed Article 107(1) TFEU in that it found the existence of State aid. The first part alleges that there was no economic advantage. In the second part, the applicants claim that the second applicant received no selective advantage.

First part, alleging absence of an economic advantage

37 The applicants claim that the Commission infringed Article 107(1) TFEU in that it found that there had been an economic advantage for the second applicant. They submit that there was no such advantage, because the criteria laid down by the Court of Justice in the judgment in *Altmark Trans and Regierungspräsidium Magdeburg* (cited in paragraph 18 above, EU:C:2003:415) had been satisfied.

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

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

40 It should be borne in mind that, in the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 18 above (EU:C:2003:415), the Court of Justice observed that, where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings did not enjoy a real financial advantage and the measure thus did not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such a measure was not caught by Article 107(1) TFEU. However, for such compensation to escape classification as State aid in a particular case, four cumulative conditions must be satisfied (judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 18 above, EU:C:2003:415, paragraphs 87 and 88).

41 It is apparent from recitals 114 to 128 of the contested decision that in the Commission's view the first and fourth criteria laid down in the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 18 above (EU:C:2003:415), were not satisfied in the present case.

– The first criterion laid down in the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 18 above (EU:C:2003:415), relating to the performance of public service obligations

42 According to this criterion, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined (judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 18 above, EU:C:2003:415, paragraph 89).

43 It should be observed that the Commission considered, in recitals 119 to 126 of the contested decision, that the first criterion in the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 18 above (EU:C:2003:415) was not satisfied.

44 According to recital 119 of the contested decision, Spanish law did not declare the operation of a terrestrial network to be a public service. Ley 11/1998, General de Telecomunicaciones (General Law 11/1998 on telecommunications) of 24 April 1998 (BOE No 99, of 25 April 1998, p. 13909, 'Law 11/1998') states that telecommunications services, including operation of networks supporting radio and television, are services of general economic interest ('SGEIs') but do not have the status of public

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

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

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

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

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

49 It should be observed that, as regards the concept of public service within the meaning of the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 18 above (EU:C:2003:415), the parties do not dispute that that concept corresponds to the concept of an SGEI within the meaning of Article 106(2) TFEU (see, to that effect, judgments of 12 February 2008 in *BUPA and Others* v *Commission*, T-289/03, ECR, EU:T:2008:29, paragraph 162, and of 16 July 2014 in *Zweckverband Tierkörperbeseitigung* v *Commission*, T-309/12, EU:T:2014:676, paragraph 132).

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

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

51 However, the Member State's power to define SGEIs is not unlimited and cannot be exercised arbitrarily for the sole purpose of removing a particular sector from the application of the competition rules (judgment in *BUPA and Others* v *Commission*, cited in paragraph 49 above, EU:T:2008:29, paragraph 168). In order to be classified as an SGEI, the service in question must be of a general economic interest exhibiting special characteristics by comparison with the general economic interest of other economic activities (judgments of 10 December 1991 in *Merci convenzionali porto di Genova*, C-179/90, ECR, EU:C:1991:464, paragraph 27, and of 17 July 1997 in *GT-Link*, C-242/95, ECR, EU:C:1997:376, paragraph 53).

52 The scope of the General Court's review of the Commission's assessments necessarily takes account of the fact that a Member State's definition of a service as an SGEI can be questioned by the Commission only in the event of a manifest error. That review must nevertheless ensure respect for certain minimum criteria relating, inter alia, to the presence of an act of the public authority entrusting the operators in question with an SGEI mission, and to the universal and compulsory nature of that mission (see judgment of 7 November 2012 in *CBI* v *Commission*, T-137/10, ECR, EU:T:2012:584, paragraphs 100 and 101 and the case law cited). Furthermore, under Article 4 of Decision 2005/842/EC of 28 November 2005 on the application of Article [106(2) TFEU] to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of SGEIs (OJ 2005 L 312, p. 67), responsibility for operation of the SGEI is to be entrusted to the undertaking concerned by way of one or more official acts, the form of which may be determined by each Member States, those acts being required to specify, in particular, the nature and the duration of the public service obligations and the undertaking and territory concerned. Paragraph 12 of the Community framework for State aid in the form of public service compensation (OJ 2005 C 297, p. 4) contains the same requirements.

53 In the first place, the applicants claim that the first criterion in the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 18 above (EU:C:2003:415), was satisfied, because, in their submission, the operation of radio and television broadcasting networks had been defined as an SGEI at national level in Spanish law and at Autonomous Community level in the interinstitutional conventions concluded in the Basque Country, as is clear from recital 119 of the contested decision. At the hearing, they explained that Law 32/2003 was the enabling framework that allowed the Spanish authorities to define an SGEI. It is common ground that the typical characteristics required in order to define an SGEI, and in particular the existence of a market failure, were satisfied in the present case. In the applicants' submission, the Commission reached its conclusion that the first criterion in the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 18 above (EU:C:2003:415) had not been satisfied on the basis of a flawed interpretation of the concepts of public service and of an SGEI in Spanish law and in EU law.

54 That argument does not show that the Commission erred in considering that, in the absence of a clear definition of the service consisting in the operation of a terrestrial network as a public service, the first criterion in the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 18 above (EU:C:2003:415), was not satisfied.

55 First, the operation of a DTT network in Area II was not defined by the Spanish State as an SGEI within the meaning of EU law at national level.

56 Admittedly, as is apparent from recital 119 of the contested decision, the service of operating the radio and television broadcasting networks was classified by the Spanish State as a service of general interest, under Article 2 of Law 11/1998 and Law 32/2003, produced by the Commission following the measures of organisation of procedure ordered by the Court (see paragraph 28 above), read in conjunction with Article 1 of those laws.

57 However, it follows from Article 2 of Law 11/1998 and Law 32/2003 that that classification applies to all telecommunications services, including the radio and television broadcasting networks. The mere fact that a service is designated in national law as being of general interest does not mean that any operator providing that service is entrusted with performing clearly defined public service obligations within the meaning of the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 18 above (EU:C:2003:415). If that were the case, all telecommunications services in Spain would be in the nature of SGEIs within the meaning of that judgment, which does not follow from those laws. In that regard, it should also be stated that Article 2(1) of Law 32/2003 expressly provides that services of general interest within the meaning of that law must be supplied in the context of a framework of free competition. However, the classification of a service as an SGEI within the meaning of the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 18 above (EU:C:2003:415), requires that responsibility for its management be entrusted to certain undertakings.

58 In addition, it should be stated that the Commission did not err in examining, in recitals 119 to 125 of the contested decision, whether the first criterion in the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 18 above (EU:C:2003:415), was satisfied as regards the service consisting in operating terrestrial networks and not as regards the service consisting in operating radio and television broadcasting networks, as the applicants maintain. In that regard, it follows from recital 120 of that decision that the provisions of Law 32/2003 are technologically neutral and that telecommunications were the transmission of signals through any telecom network and not through the terrestrial network in particular, which the applicants have not disputed. In the light of that clarification of the Spanish law, it cannot be concluded that the Commission erred in considering, in recitals 119 and 122 of that decision, that the operation of a terrestrial network was not defined in that law as a public service within the meaning of the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 18 above (EU:C:2003:415).

59 Contrary to the applicants' contention, the limitation of the service consisting in the operation of radio and television broadcasting networks to a specific platform does not constitute merely a specific implementation of that service. In the light of the principle of technological neutrality, such a limitation was not necessary according to Law 32/2003, and indeed was directly contrary to its provisions.

60 In so far as the applicants claim that the existence of the Spanish authorities' discretion as regards determination of a means for the provision of an SGEI is confirmed by Articles 2 and 3 of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1), it is sufficient to observe that, pursuant to Article 1(2), that directive applies to the award of works or services concessions to economic operators, which is not called into question by the fact that Articles 2 and 3 of that directive emphasise the importance of the principles of free administration by the public authorities, equal treatment, non-discrimination and transparency.

61 As regards the application of the competition rules, a distinction must be drawn between a situation where the State acts in the exercise of official authority and that where it carries on economic activities of an industrial or commercial nature by offering goods or services on the market. In that respect, it is of no importance that the State is acting directly through a body forming part of the State administration or by way of a body on which it has conferred special or exclusive rights (see judgments of 18 March 1997 in *Diego Calì & Figli*, C-343/95, ECR, EU:C:1997:160, paragraphs 16 and 17 and the case-law cited, and of 12 July 2012 in *Compass-Datenbank*, C-138/11, ECR,

EU:C:2012:449, paragraph 35 and the case-law cited). The existence or otherwise of legal personality distinct from that of the State, conferred by national law on a body carrying out economic activities, does not prevent the existence of financial relations between the State and that body and, consequently, the possibility that that body will benefit from State aid within the meaning of Article 107(1) TFEU (see judgment of 24 March 2011 in *Freistaat Sachsen and Land Sachsen-Anhalt* v *Commission*, T-443/08 and T-455/08, ECR, EU:T:2011:117, paragraph 129 and the case-law cited).

62 Nor, second, has the operation of a DTT network been defined as an SGEI, within the meaning of EU law, at Autonomous Community level in the interinstitutional conventions concluded in the Basque Country.

63 In that regard, it should be observed that in the interinstitutional conventions in question the Basque authorities did indeed recognise that the values of universal access to information and the plurality of information required the universality of free-to-air television and that they considered, while referring to the need for Basque citizens to have access to the entire DTT offer, that, in those circumstances, they would extend the coverage of the State multiplexes on the conditions stated. However, as the Commission stated in recital 124 of the contested decision, no provision in the conventions suggests that the operation of the terrestrial network is considered to be a public service. In addition, the applicants expressly assert that the first applicant did not at any time claim that the provision of the broadcasting service by means of the terrestrial platform, and not the provision of the service by means of other platforms, constituted an SGEI.

64 In addition, it should be remembered that Law 32/2003, which, according to the applicants, constituted the enabling framework that allowed the Spanish authorities to define an SGEI, was characterised by respect for the principle of technological neutrality (see paragraph 58 above). It therefore cannot be concluded that in the conventions in question the Basque authorities defined the operation of the DTT network as an SGEI, excluding the use of any other technology in order to transmit the television signal in Area II.

65 In the second place, the applicants claim that the Commission was wrong to draw a distinction between the supply of the broadcasting service and the operation of the broadcasting networks. In their submission, while it is common ground that the broadcasting service is a public service, ensuring and financing the network which allows that service to be provided is also essential and pursues a general interest. The applicants refer in that regard to Ley 31/1987 de Ordenación de las Telecomunicaciones (Law 31/1987 on the organisation of broadcasting) of 18 December 1987 (BOE No 303, of 19 December 1987, p. 37409, 'Law 31/1987'), which provides that sound and television broadcasting services via terrestrial waves are public services.

66 In that regard, it should be pointed out that transmission is indeed indispensable to broadcasting. Although, according to the case-law, the manner in which sound or images are transmitted is not a determining element in the assessment of the concept of broadcasting (judgments of 2 June 2005 in *Mediakabel*, C-89/04, ECR, EU:C:2005:348, paragraph 33, and of 22 December 2008 in *Kabel Deutschland Vertrieb und Service*, C-336/07, ECR, EU:C:2008:765, paragraph 64), the fact none the less remains that there is a link of dependence between the two services.

67 However, as the Commission asserts, the broadcasting service must be distinguished from the broadcasting networks operating service. They are two separate activities carried out by different undertakings operating on different markets. While the broadcasting service is supplied by broadcasters, namely television operators, the broadcasting networks operating service is supplied by signal emission platform operators, namely terrestrial, satellite, cable or broadband Internet platforms.

68 As the intervener claims, such a distinction is also drawn in the communications sector. It is apparent from recital 5 of Directive 2001/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33) that it is necessary to separate the regulation of transmission from the regulation of content.

69 The applicants also refer to the fact that Protocol No 29 on the system of public broadcasting in the Member States, supplementing the EU and FEU Treaties, emphasises the power of the Member States concerning the public service remit of broadcasting as conferred, defined and organised by each Member State. In that regard, it should be noted that that protocol applies to the broadcasting sector (judgment of 10 July 2012 in *TF1 and Others* v *Commission*, T-520/09, EU:T:2012:352, paragraph 94) and, more specifically, to the financing of the public broadcasting service granted to the broadcasting bodies, namely, in this instance, the television operators. Conversely, the financing of signal emission platform operators is not covered by that protocol.

70 Furthermore, where, in Protocol No 29 on the system of public broadcasting in the Member States, supplementing the EU and FEU Treaties, the Member States stated that the system of public broadcasting in the Member States was directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism, they were directly referring to the public service broadcasting systems established by them and entrusted with the broadcasting, for the benefit of the whole population of those States, of general television programmes (judgment of 26 June 200 in, *SIC* v *Commission*, T-442/03, ECR, EU:T:2008:228, paragraph 198). In the present case, since Royal Decree 944/2005 required national broadcasters to cover 96% of the population in the case of the private sector and 98% of the population in the case of the public sector (see paragraph 2 above) and since, for virtually the whole of Area II, such a coverage obligation ensured access to the public channels, while the topography of Area III precluded terrestrial digital transmission (see paragraph 3 above), the measure at issue was intended in essence to finance the extension of coverage of the population by television operators in the private sector. In addition, it should be observed that the objectives of the protocol, namely to guarantee the democratic, social and cultural needs of society and to preserve media pluralism, have no connection with the choice of broadcasting technology.

71 As regards the argument relating to Law 31/1987, it must be rejected. That law was not produced before the Court. However, it should be borne in mind that, in the context of the adoption of a decision on State aid, the establishment of national law is a question of fact (see, to that effect, judgment of 21 December 2011 in *A2A* v *Commission*, C-318/09 P, EU:C:2011:856, paragraph 125 and the case-law cited). The question whether, and to what extent, a rule of national law applies or does not apply to the instant case falls within the scope of a factual assessment by the Court and is subject to the rules on the taking of evidence and on the apportionment of the burden of proof (judgment of 20 September 2012 in *France* v *Commission*, T-154/10, ECR, EU:T:2012:452, paragraph 65). Furthermore, the applicants' argument that under that law sound and television broadcasting services by terrestrial waves are public services does not in any event permit the conclusion that, in addition to broadcasting, that law also defines other services as public services.

72 In addition, it should be noted that the applicants have not at any time been able to determine what public service obligations were entrusted to DTT network operators, either by Spanish law or by the operating conventions, let alone adduce evidence to that effect.

73 In the third place, in so far as the applicants claim that the Commission acted in a contradictory fashion in that it had already considered that the deployment of broadband networks could be considered to be an SGEI, their argument cannot be upheld. It must be examined separately, for each service, whether the requirements of the first criterion in the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 18 above (EU:C:2003:415), namely whether the beneficiary undertaking is actually entrusted with discharging public service obligations and whether those obligations are clearly defined, are satisfied. It should be borne in mind that the concept of

State aid must be applied to an objective situation, the sole test being whether a State measure confers an advantage on one or more particular undertakings. The Commission practice in taking decisions in the area, on which, moreover, the parties disagree, cannot therefore be a decisive factor (see judgment of 4 March 2009 in *Associazione italiana del risparmio gestito and Fineco Asset Management* v *Commission*, T-445/05, ECR, EU:T:2009:50, paragraph 145 and the case-law cited). Furthermore, it should be observed that respect for the principle of technological neutrality is also decisive for the determining of the service of setting up and operating a broadband electronic communications network as an SGEI (judgment of 16 September 2013 in *Iliad and Others* v *Commission*, T-325/10, EU:T:2013:472, paragraphs 142 to 145).

74 As regards, in that respect, the applicants' argument that the Commission acted in a contradictory fashion in accepting the sole choice of satellite technology in order to supply the broadcasting service in Area III, it is sufficient to point out that the operating service in that area is not part of the subject-matter of the present case and that that area was defined as a territory in which, owing to its oreographical conditions, terrestrial reception was not possible or gave rise to exceptional difficulties. In addition, the fact that the Commission accepts the choice of a particular technology in one area cannot justify the choice of a different technology in a different area.

75 In addition, the applicants claim that the Commission erred in justifying its position by referring to the case concerning State aid implemented by the Federal Republic of Germany in favour of the introduction of DTT (DVB-T) in the district of Berlin-Brandenburg (Germany), which gave rise to the judgment of 6 October 2009 in *Germany* v *Commission* (T-21/06, EU:T:2009:387) and to the judgment of 15 September 2011 in *Germany* v *Commission* (C-544/09 P, EU:C:2011:584). In that regard, it should be pointed out that in those judgments the Courts of the European Union did not examine the question whether the terrestrial network operating service had been validly defined as an SGEI, in accordance with the requirements of the first criterion in the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 18 above (EU:C:2003:415). The question examined was, rather, whether the aid at issue was compatible with the internal market, pursuant to Article 107(3)(c) TFEU. It was also in that context that the Commission referred to that aid, as is apparent, in particular, from footnote 77 in the contested decision.

76 In the fourth place, as regards the Commission's finding, made in the alternative and set out in recital 121 of the contested decision, that the definition of the operation of one particular support platform, in this instance the operation of the terrestrial platform, as a public service would have constituted a manifest error on the part of the Spanish authorities, the applicants assert that the Commission could not merely consider that, because those authorities had chosen a certain technology, they had made a manifest error. In the applicants' submission, the principle of technological neutrality is not an absolute principle. Referring to two studies, the applicants claim that the Commission ought to have examined whether the Spanish authorities' analysis relating to the choice of the technology to be used was manifestly incorrect.

77 It is true that it follows from the general structure of the Treaty that the procedure provided for in Article 108 TFEU must never achieve a result that would be contrary to the specific provisions of the Treaty (see judgments of 15 April 2008 in *Nuova Agricast*, C-390/06, ECR, EU:C:2008:224, paragraph 50 and the case-law cited, and of 16 October 2013 in *TF1* v *Commission*, T-275/11, EU:T:2013:535, paragraph 41 and the case-law cited). The discretion which Member States enjoy when setting up their SGEIs cannot be exercised in a way that gives rise to a breach of the principle of equal treatment which is ensured, as regards the network operation service, in particular by the principle of technological neutrality. Thus, where there are several transmission platforms, as in the present case, it is not possible to consider that one of them is essential to the transmission of broadcasting signals, thereby disregarding the principle of technological neutrality. In defining the CTT network operating service as an SGEI, the Spanish authorities were therefore not entitled to discriminate against other platforms. A system of undistorted competition, such as that provided for

by the FEU Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators (see judgment of 28 February 2013 in *Ordem dos Técnicos Oficiais de Contas*, C-1/12, ECR, EU:C:2013:127, paragraph 88 and the case-law cited).

78 However, respect for the principle of technological neutrality does not mean that in every case defining a particular platform for the operation of the broadcasting networks constitutes a manifest error. In recital 121 of the contested decision, the Commission stated that the Spanish authorities would have made a manifest error if they had determined a particular platform as such. It therefore did not examine whether such a choice was objectively justified in the present case, given the wide discretion which the Spanish authorities enjoy when defining what they consider to be an SGEI. When considering Article 107(3)(c) TFEU, the Commission considered whether the choice of a particular technology could be accepted. However, those considerations cannot be taken into account in order to resolve the question whether the Commission was correct to find that the Spanish authorities had made a manifest error concerning the definition of an SGEI, because the examination of the lawfulness of the definition of an SGEI, pursuant to Article 107(1) TFEU, is different from the examination of the compatibility of aid, in accordance with Article 107(3) TFEU. While the Member States have a wide discretion in relation to the definition of an SGEI, it is the Commission that has a wide discretion in relation to the question whether aid is compatible with the internal market. Consequently, since the Commission did not examine the Member State's choice more thoroughly, it was not correct to find that the Spanish authorities made a manifest error when defining a particular platform for that operation.

79 In the light of the foregoing, although the Commission was wrong to consider that the definition of a particular platform for the operation of the broadcasting networks constituted a manifest error on the part of the Spanish authorities, the first criterion in the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 18 above (EU:C:2003:415), was not satisfied in the absence of a clear and precise definition of the service at issue as a public service, as the Commission found in recitals 119 to 125 of the contested decision.

– The fourth criterion laid down in the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 18 above (EU:C:2003:415), relating to ensuring the least cost for the community

80 According to this criterion, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations (judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 18 above, EU:C:2003:415, paragraph 93).

81 In recital 128 of the contested decision, la Commission observed that, as there had been no call for tenders, the Basque authorities argued that that criterion was satisfied, owing to the fact that the Basque Government public undertaking which supplied the design and coverage of radio and television broadcasting was a well-run company adequately provided with the means to perform the requested activities. On the basis of a study comparing the costs, which was not communicated to the Commission, the Basque authorities concluded that the satellite infrastructure would have been more expensive than upgrading the terrestrial network of the public undertaking concerned. However, according to the Commission, in order to fulfil the criterion in question, a comparison with satellite technology was not sufficient to establish that that public undertaking was efficient, since there could also have been other terrestrial operators which could have performed that service at lower cost. The

Commission therefore concluded that the fourth criterion in the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 18 above (EU:C:2003:415), was not satisfied in the case of the Autonomous Community of the Basque Country.

82 The applicants dispute that reasoning and claim that the second applicant was a well-run undertaking in the terrestrial network operators sector and that its costs were consistent with the market. In the interinstitutional conventions concluded between the Basque authorities in that regard, market parameters were taken into account when determining its remuneration. According to the applicants, the second applicant's compensation therefore corresponded to market prices and ensured that the service would be provided at the lowest cost. In addition, when the second applicant acquired supplies, equipment and other services, it always did so through procurement procedures. In addition, according to the applicants, the second applicant already had the physical infrastructure necessary to transport the network, unlike other undertakings. The digitisation process is simply an adaptation of the existing networks by switching from analogue technology to digital technology. The choice of a different operator would have meant a duplication of the infrastructure, which the Commission prohibited in the context of the deployment of the broadband network. The second applicant is therefore the only terrestrial networks operator capable of supplying the service in question. In the applicants' submission, their assessment is confirmed by the Commission's practice concerning the State aid scheme implemented by the Republic of Slovenia in the context of its legislation relating to qualified energy producers. Last, the costs of the terrestrial option are lower than those of the satellite option, which is confirmed by a report drawn up by the first applicant. Contrary to the Commission's assertion in footnote 69 of the contested decision, the Commission did receive that report.

83 In that regard, first, it should be observed that, in recital 128 of the contested decision, the Commission considered, in essence, that the fourth criterion in the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 18 above (EU:C:2003:415), was not satisfied, because the Basque authorities had not shown that the second applicant was an efficient undertaking, since other terrestrial network operators could also have performed the service in question at a lower cost. Consequently, the question whether the costs of the terrestrial option were lower than those of the satellite option is therefore of no relevance in the examination of respect for the present criterion. As the report of the Basque authorities referred to in footnote 69 of that decision relates to that question, the question whether that report was actually communicated to the Commission is not relevant for the purposes of ascertaining whether the Commission was entitled to consider that the fourth criterion in the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 18 above (EU:C:2003:415), was not satisfied.

84 Second, it is appropriate to reject the argument that the second applicant is a well-run undertaking on the ground that it received compensation only for the costs actually incurred in purchasing the necessary equipment, because, in the interinstitutional conventions concluded between the Basque authorities in that regard, the market parameters were taken into account when determining its remuneration. It must be pointed out that the second applicant's activity was not confined to purchasing equipment and that the Autonomous Community of the Basque Country had entrusted it with the deployment, maintenance and operation of the television network in the Basque Country (see paragraph 13 above). Furthermore, as the Commission asserts, the indication of the investment cost and the recurring expenditure estimated in those conventions is no substitute for an analysis of the costs which a typical undertaking, well run and adequately equipped to be able to satisfy the necessary public service requirements, would have incurred in performing those obligations, taking account of the associated revenues and also of a reasonable profit for the performance of those obligations.

85 Third, it is appropriate to reject the argument that the second applicant already had the necessary physical infrastructure to transport the network, unlike other undertakings, and that the digitisation process is a mere adaptation of the existing network, so that the choice of a different operator would have entailed a duplication of the infrastructure. That argument wholly fails to demonstrate that the second applicant was chosen on the basis of an analysis of the costs which a typical undertaking, well

run and adequately provided in order to be able to satisfy the relevant public service requirements, would have incurred. The applicants have not shown that the award of the service in question to a different operator would have entailed a duplication of the infrastructure. It cannot be precluded that, as the Commission asserts, the deployment of the terrestrial network could have been entrusted to other operators without their being required to deploy a new infrastructure.

86 Fourth, as regards the argument that their assessment is confirmed by Commission Decision C 7/2005 of 24 April 2007 on the State aid scheme implemented by the Republic of Slovenia in the context of its legislation on qualified energy producers, it should be observed that the applicants have not shown that the energy sector and the broadcasting sector are comparable in such a way that an assessment carried out by the Commission in one case can be transposed to the other. Furthermore, as has been recalled (see paragraph 73 above), the concept of State aid must be applied to an objective situation, the sole test being whether a State measure confers an advantage on one or more particular undertakings. The Commission's practice in taking decisions — on which, moreover, the parties disagree — cannot therefore be a decisive factor.

87 Fifth, the argument that the Basque authorities were entitled to entrust the service in question to the second applicant without first launching a call for tenders because the service was provided from the authorities' own means must be rejected. The mere fact that a service is provided by an administration from its own means does not ensure the lowest costs for the community.

88 It follows that the applicants have not shown that the Commission erred in finding that the fourth criterion in the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 18 above (EU:C:2003:415), was not satisfied.

89 In the light of the foregoing, it must be concluded that all the criteria in the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 18 above (EU:C:2003:415), were not satisfied cumulatively at any time. The Commission therefore did not err in finding that there was an economic advantage for the second applicant.

90 The first part of the first plea must therefore be rejected.

Second part, alleging that there was no selective advantage

91 The applicants claim that the second applicant did not obtain a selective advantage for the purposes of Article 107(1) TFEU, since it merely provided services regarded as SGEIs, in compliance with the criteria laid down in the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 18 above (EU:C:2003:415). They maintain that in the contested decision the criterion of selectivity coincides with the alleged breach of the principle of technological neutrality.

92 That argument must be rejected.

93 Contrary to the applicants' assertion, in the contested decision the criterion of selectivity did not 'coincide' with the breach of the principle of technological neutrality. It is clear from recital 113 of the contested decision that, in the Commission's view, the advantage was selective, as the measure in question benefited only the broadcasting sector and as, within that sector, the measure concerned only the undertakings active in the terrestrial platform market.

94 Furthermore, it should be observed that the criterion of selectivity for the purposes of Article 107(1) TFEU requires that the measure in question favours certain undertakings or the production of certain goods. That criterion is a criterion specific to the concept of State aid (see paragraph 38 above). Consequently, even on the assumption that the second applicant did provide an SGEI in accordance

with the criteria laid down in the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 18 above (EU:C:2003:415), that would not show that the Commission was wrong to consider, in recital 113 of the contested decision, that the measure in question was selective.

95 In addition, it should be observed that a measure such as that in question does not apply without distinction to all economic operators. It cannot therefore be considered to be a general tax or economic policy measure which does not constitute State aid within the meaning of Article 107 TFEU (see, to that effect, judgments of 10 January 2006 in *Cassa di Risparmio di Firenze and Others*, C-222/04, ECR, EU:C:2006:8, paragraph 135, and of 18 July 2013 in *P*, C-6/12, ECR, EU:C:2013:525, paragraph 18 and the case-law cited).

96 It follows that the second part of the first plea and, consequently, the plea in its entirety must be rejected.

Second plea, alleging an error of law in the analysis of the compatibility of the measure at issue with the internal market

97 This plea consists of two parts. The first part relates to an error made by the Commission in the application of Decision 2005/842. In the context of the second part, the applicants claim that the Commission incorrectly failed to regard the measure at issue as compatible with the internal market pursuant to Article 107(3)(c) TFEU.

First part, alleging an error in the application of Decision 2005/842

98 The applicants claim that the Commission was wrong not to consider that the measure at issue was compatible with the internal market pursuant to Article 106(2) TFEU and to Decision 2005/842, which was in force when the concession agreements in favour of the second applicant were signed. They maintain that the Spanish authorities defined the service in question as an SGEI and that the Basque authorities entrusted the second applicant with supplying that service in the Basque Country. In addition, under that decision the Spanish authorities were exempt from the obligation to notify the Commission, since the annual amount of the compensation for the service in question was below EUR 30 million. In addition, the other conditions for the application of that decision were satisfied, since the second applicant's compensation did not exceed what was necessary to cover the costs of the service.

99 That argument must be rejected. According to Article 1 of Decision 2005/842, that decision sets out the conditions under which State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest is to be regarded as compatible with the common market and exempt from the requirement of notification laid down in Article 108(3) TFEU. Since it has already been established that the Commission was entitled to take the view that the terrestrial network operators in the Basque Country were not entrusted with performing an SGEI (see paragraphs 42 of 79 above), Decision 2005/842 was therefore not applicable in the present case and the Commission did not err in considering, in recital 172 of the contested decision, that the exception referred to in Article 106(2) TFEU could not be invoked.

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

Second part, alleging infringement of Article 107(3)(c) TFEU

101 The applicants take issue with the Commission for having infringed Article 107(3)(c) TFEU in that it denied that the measure at issue was technologically neutral, appropriate and proportionate and also that the measure constituted a minimum measure necessary to achieve the objective pursued, avoiding needless distortions of competition.

– First complaint, alleging errors relating to the technological neutrality and to the appropriate and proportionate nature of the measure at issue

102 The applicants claim that the Commission erred in finding that the measure at issue did not respect the principle of technological neutrality, was not proportionate and did not constitute an appropriate instrument.

103 It follows from recitals 153 to 167 of the contested decision that the Commission considered that the aid at issue could not be considered compatible with the internal market pursuant to Article 107(3)(c) TFEU, because, in its view, the measure at issue did not respect the principle of technological neutrality, was not proportionate and did not constitute an appropriate instrument to ensure coverage of the free-to-air channels to residents in Area II. In that regard, it stated, in recital 155 of the contested decision, that the vast majority of calls for tenders had not been technologically neutral, since they referred to terrestrial technology and to DTT. According to recitals 156 and 157 of the contested decision, no study sufficiently demonstrated the superiority of the terrestrial platform over the satellite platform. As regards the proportionality of the measure at issue, the Commission considered, in recital 166 of the contested decision, that the Spanish Government could at least have encouraged the Autonomous Communities to launch calls for tenders that took account of any cost savings that might be made through the use of particular platforms.

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

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

106 It should also be borne in mind that, while the Commission has a margin of discretion in economic matters, that does not mean that the Courts of the European Union must refrain from reviewing the Commission's interpretation of information of an economic nature. The Courts of the European Union must establish not only whether the evidence relied on is factually accurate, reliable and consistent, but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it. However, when conducting such a review, those Courts must not substitute their own economic assessment for that of the Commission. Moreover, it must be noted that, where an institution has a wide discretion, the review of observance of certain procedural guarantees is of fundamental importance. According to the case-law, those guarantees include the obligation for the competent institution to examine carefully and impartially all the relevant elements

of the individual case and to give an adequate statement of the reasons for its decision (see judgment of 22 November 2007 in *Spain* v *Lenzing*, C-525/04 P, ECR, EU:C:2007:698, paragraphs 56 to 58 and the case-law cited).

107 In the first place, the applicants claim that, contrary to the approach taken by the Commission in the contested decision, the application of the principle of technological neutrality depends on each individual case and on the factual circumstances in the different territories of the European Union. In their submission, it follows both from the Communication of 17 September 2003 from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the transition from analogue to digital broadcasting (from digital 'switchover' to analogue 'switch-off') (COM(2003) 541 final) ('the 2003 Switchover Communication') and from the Communication of 24 May 2005 from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on accelerating the transition from analogue to digital broadcasting (COM(2005) 204 final) that the principle of technological neutrality is not absolute. The Spanish law cites it only as a principle to be taken into consideration so far as possible.

108 That argument does not show that the Commission made a manifest error, however. It is apparent from recital 154 of the contested decision that the Commission did not consider that the principle of technological neutrality was an absolute principle, but that the choice of technology should normally be made following a technologically neutral tender procedure, as happened in other Member States. According to the Commission, as no call for tenders was launched in the present case, the choice of a particular technology could have been accepted if it had been justified by findings of an ex-ante study proving that, in terms of quality and cost, only one technological solution could have been chosen. The burden of proof lies with the Member State, which must establish that the study is sufficiently robust and that it was carried out in a wholly independent manner. It follows that, contrary to the applicants' assertion, the Commission did not preclude that, in a particular case, the factual circumstances may allow a particular technology to be chosen.

109 The importance of the principle of technological neutrality in this connection was emphasised by the Commission in paragraph 2.1.3 of the 2003 Switchover Communication, as is apparent from recital 144 of the contested decision. The condition of technological neutrality within the meaning of that communication provides, in particular, that analogue broadcasting in a particular territory can be discontinued only if virtually all households receive digital services and that, in order to achieve that objective, all modes of transmission must be taken into account (judgment in *Germany* v *Commission*, cited in paragraph 75 above, EU:T:2009:387, paragraph 69). Where the Commission adopts such measures which are consistent with the Treaty and are designed to specify the criteria which it intends to apply in the exercise of its discretion, it itself limits that discretion in that it must comply with the indicative rules which it has imposed upon itself (judgment of 28 November 2008 in *Hotel Cipriani and Others* v *Commission*, T-254/00, T-270/00 and T-277/00, ECR, EU:T:2008:537, paragraph 292).

110 Furthermore, in so far as the applicants submitted at the hearing, referring to the 2003 Switchover Communication, that the choice of a particular technology by the Member State does not require an ex-ante study, it should be pointed out that, according to paragraph 2.1.3 of that communication, any public support for one particular option should be justified by well-defined general interests and implemented in a proportionate way.

111 In the second place, the applicants claim that the choice of the terrestrial platform was justified, according to various reports. In their submission, it follows from the report on the reference costs of the DTT universalisation process in Spain, dating from July 2007, prepared by the Spanish authorities that the theoretical concept of technological neutrality was not applicable to the technological transition from terrestrial television in the specific circumstances of the television market in Spain. That report concluded that digitisation by means of a technology other than terrestrial would result in

a much higher economic cost, that the satellite platform was not viable, because the necessary authorisations of the television operators would not be issued, and that using a technology other than the terrestrial technology would entail serious delays in the digitisation process. That conclusion was set out in the first applicant's analysis, which confirmed that the terrestrial technology was preferable on economic and technical grounds. In addition, the choice of the satellite solution in Area III, which was not disputed by the Commission, provides that the Spanish authorities objectively chose the most appropriate technology in each particular case. That point of view is also confirmed by the study of a telecommunications infrastructure operator/network equipment supplier, which, in the applicants' submission, the Commission ought to have assessed. However, in recitals 158 and 164 of the contested decision, the Commission ascribed probative value to the intervener's study and did not refer specifically to the various reports of the Autonomous Communities. In the alternative, the Commission breached the obligation to state reasons.

112 It should be borne in mind that, in order to establish that the Commission made a manifest error in assessing the facts such as to justify the annulment of the contested decision, the evidence adduced by the applicant must be sufficient to make the factual assessment used in the decision implausible (judgments of 12 December 1996 in *AIUFFASS and AKT* v *Commission*, T-380/94, ECR, EU:T:1996:195, paragraph 59, and in *FAB* v *Commission*, cited in paragraph 50 above, EU:T:2009:386, paragraph 78).

113 First, as regards the report referred to in paragraph 111 above, it should be noted that, according to recital 156 of the contested decision, that report did not sufficiently demonstrate the superiority of the terrestrial platform over the satellite platform. It concluded that the choice of a particular technological solution for the extension of coverage should be analysed on a region-by-region basis, taking into account the topographic and demographic features of each region. It thus highlights the need for a technologically neutral tendering procedure in order to determine which platform is the most appropriate.

114 Those considerations are not vitiated by an error of law. It follows from paragraph 6 of the report referred to in paragraph 111 above that the Spanish authorities analysed two possible scenarios, namely the extension of coverage of the population from 98 to 100% and the extension of the coverage of the population from 96 to 100%. Neither of those two scenarios corresponds to the extension of coverage of the population from 96 to 98.5%. In addition, according to the conclusions of that report relating to those two scenarios, it was likely that the most appropriate final outcome would be achieved if both alternatives, namely the terrestrial and satellite platforms, were taken into consideration, one or the other solution being chosen depending on the case, according to the conditions and circumstances of the physical location of the population to which coverage would be extended. It is impossible to predict the proportion in which each alternative would contribute to the final outcome without first carrying out a detailed study for each Autonomous Community, having regard to the oreography of the land, the territorial distribution of the population and the situation of the existing television broadcasting network. It follows from the foregoing that the analysis carried out in that report did not justify the failure to observe the principle of technological neutrality. Furthermore, while it is true that, as the applicants assert, according to that report, apart from coverage of around 90 households, terrestrial broadcasting would be the most economic solution, the fact none the less remains that that conclusion was expressly added for information and did not call into question the other findings made in the report in question.

115 Second, as regards the first applicant's analysis, it is apparent from recital 157 of the contested decision that, throughout the administrative investigation, a number of Autonomous Communities submitted internal calculations or compared the costs of using both technologies to extend the coverage. However, in addition to uncertainty about the date of those calculations, none of them was sufficiently detailed and objective to justify the choice of terrestrial technology to extend the coverage. Furthermore, according to the Commission, none of them was carried out by an independent expert.

116 As the first applicant's analysis was concerned by the reasoning set out in recital 157 of the contested decision, as the Commission confirmed at the hearing, the Commission's rejection of that analysis is not vitiated by a manifest error. It should be observed that that analysis is undated and it follows from the Basque authorities' observations of 24 February 2011, submitted during the administrative procedure, that the analysis in question confirmed the study of a telecommunications infrastructure operator/network equipment supplier dating from 2010. As the analysis in question therefore post-dated the measures at issue by a considerable extent, it cannot justify the failure to observe the principle of technological neutrality by the choice of the terrestrial platform. According to the case-law, the question whether a measures constitutes State aid must be resolved having regard to the situation existing at the time when the measure was implemented (see judgment of 12 May 2011 in *Région Nord-Pas-de-Calais and Communauté d'Agglomération du Douaisis* v *Commission*, T-267/08 and T-279/08, ECR, EU:T:2011:209, paragraph 143 and the case-law cited).

117 In so far as the applicants claim, in that regard, that the Commission was wrong to consider, in footnote 69 of the contested decision, that the first applicant's study had not been made available to it, it is sufficient to observe that, in that footnote, the Commission stated that a study relating to the estimates of the Basque authorities, to the effect that the satellite infrastructure would have been more expensive than the modernisation of the terrestrial network by the second applicant, was not made available to it. It is apparent from the correspondence between the Spanish authorities and the Commission that the Commission requested further information on the evaluation of the costs carried out by the Basque authorities. However, that information was not supplied to the Commission. It is for that reason that the Commission stated, in recital 157 of the contested decision, that the analysis carried out by the Basque authorities did not provide sufficient detail to justify the choice of terrestrial technology to extend the coverage.

118 Third, in so far as the applicants assert that the choice of the satellite solution in Area III, which was not disputed by the Commission, proves that the Spanish authorities objectively chose the most appropriate technology in each individual case, it should be pointed out that that argument has already been rejected in the context of the first part of the first plea (see paragraph 74 above).

119 Fourth, the applicants claim that their viewpoint was also confirmed by studies carried out by a telecommunications infrastructure operator/network equipment supplier that the Commission ought to have assessed. In that regard, the Commission considered, in recital 158 of the contested decision, that those studies dated from 2010 and were therefore carried out long after the measures at issue were implemented. According to the Commission, irrespective of the fact that those studies could be considered sufficiently independent and reliable, the fact that they post-dated the measures at issue meant that could not be used to justify the fact that the Spanish Government had not deemed it appropriate to organise a technologically neutral tender procedure. The Commission added that the results of those studies were contradicted by cost estimates submitted by the intervener which demonstrated that satellite technology was more cost effective.

120 None of the evidence adduced by the applicants shows that those considerations are manifestly incorrect. It is apparent from footnotes 37 and 38 of the contested decision, which contain a summary of the content of the studies carried out by a telecommunications infrastructure operator/network equipment supplier, produced by the Commission following the measures of organisation of procedure ordered by the Court (see paragraph 28 above), and also from recital 158 of that decision, which contains the Commission's assessment of those studies in relation to the present case, that the Commission did examine those studies. Furthermore, it should be pointed out that those studies date from 2010 and have 2009 as their reference year. The Commission was therefore entitled to find that those studies post-dated the measures at issue. It has already been stated that the question whether a measure constitutes State aid must be resolved having regard to the situation existing at the time when the measure was adopted (see paragraph 116 above). As may be seen from a comparison of the studies in question with the cost estimates submitted by the intervener, produced by the Commission in response to the measures of organisation of procedure ordered by the Court (see paragraph 28

above), the Commission was entitled to find that the intervener's estimates contradicted the results of the studies concerned. Furthermore, the applicants themselves emphasise that the decision concerning the choice of platform was not taken by that operator, but by the Spanish authorities, which were not aware of the studies in question when they adopted their decision.

121 In so far as the applicants claimed in that respect at the hearing, referring to the judgment of 3 July 2014 in *Spain and Others* v *Commission* (T-319/12 and T-321/12, EU:T:2014:604), that the Commission should also have accepted reports supplied after the event, their argument cannot be upheld. It should be observed that in the case giving rise to that judgment the question was whether a Member State had acted as a private investor would have done and not whether a measures was compatible with the internal market under Article 107(3)(c) TFEU. In that regard, the Court considered, in paragraph 134 of that judgment, that supplementary economic analyses, supplied by the Member State during the administrative procedure, were able to shed light on factors existing at the time when the investment decision was taken and should have been taken into account by the Commission. Such a conclusion does not call into question the case-law to the effect that the question whether a measure constitutes State aid must be resolved having regard to the situation existing at the time when the measure was implemented, since if the Commission took subsequent factors into account, it would be conferring an advantage on Member States which fail in their obligation to give notice at the planning stage of aid which they intend to grant (see judgment in *Région Nord-Pas-de-Calais and Communauté d'Agglomération du Douaisis* v *Commission*, cited in paragraph 116 above, EU:T:2011:209, paragraph 143 and the case-law cited).

122 Fifth, the applicants claim that the Commission disputed the studies carried out by a telecommunications structures operator and network equipment supplier, while ascribing without any explanation, in recitals 158 and 164 of the contested decision, greater probative value to the calculations of the costs carried out by the intervener.

123 That argument cannot be upheld. As regards recital 158 of the contested decision, it has been stated (see paragraph 119 above) that the Commission considered in that recital that, irrespective of whether the studies in question could be considered to be sufficiently independent and reliable, the fact that they post-dated the measures at issue meant that they could not be used to justify the fact that the Spanish Government did not deem it appropriate to organise a technologically neutral tender procedure. The Commission added that the results of those studies were contradicted by the cost estimates submitted by the intervener, which demonstrated that satellite technology was more cost effective.

124 It follows from recital 158 of the contested decision that the Commission rejected the studies submitted by a telecommunications infrastructure operator/network equipment supplier, without commenting on the independence and reliability of those studies, on the ground that they post-dated the measures at issue and were contradicted by the cost estimates provided by the intervener. Contrary to the Spanish authorities' contention, the Commission did not favour the study submitted by the intervener over those submitted by that operator. Rather, it merely presented the content of the intervener's study, which found that satellite technology was more cost effective, which contradicted the results of the studies submitted by that operator. That conclusion is confirmed by the fact that it follows from recital 154 of the contested decision that, according to the Commission, the choice of a particular technology could have been accepted if it had been justified by the conclusions of an ex-ante study proving that, in terms of quality and cost, only one technological solution could have been selected. Contrary to the applicants' assertion, the Commission therefore did not consider that the intervener's study was valid or that it demonstrated the superiority of the satellite solution. Its purpose was to examine whether, owing to the failure to observe the principle of technological neutrality, the measures at issue might be justified by an ex-ante study opting for only one technological solution.

125 As regards recital 164 of the contested decision, moreover, the Commission stated in that recital that, according to the intervener, the number of 1 380 regional channels put forward by the Spanish authorities was hugely exaggerated. On the other hand, it did not find that the number of regional channels estimated by the intervener, namely 415 according to footnote 93 of that decision, was correct. In so far as it took the view, in that recital, that the Spanish authorities had not substantiated their argument that satellite technology was not equipped to broadcast a large number of regional channels, it merely applied the rule relating to the burden of proof stated in recital 154 of the contested decision, from which it follows that it was for the Kingdom of Spain to establish that, in terms of quality and cost, it was not possible to choose only a single technological solution.

126 Sixth, the applicants assert that the Commission did not refer specifically to the various reports prepared by the Autonomous Communities. That argument must also be rejected. As regards the Basque Country, it has already been stated that the Commission's assessment was not vitiated by a manifest error (see paragraphs 115 and 116 above). Furthermore, in the absence of any information relating to the relevance of the reports of other Autonomous Communities to the situation of the Basque Country, it cannot be concluded that the Commission made a manifest error in its assessment of the facts relating to the Basque Country.

127 Last, the applicants' argument that the Commission breached its obligation to state reasons when assessing the first applicant's analysis must be rejected. The reasons why, according to the Commission, the Basque authorities' analysis was not sufficient to justify the choice of terrestrial technology to extend coverage are stated to the requisite legal standard in recital 157 of the contested decision (see paragraph 116 above).

128 In the third place, in so far as the applicants claim that the Commission erred because, in three earlier cases, it had authorised aid that did not respect the principle of technological neutrality, their arguments must also be rejected.

129 It should be pointed out that the applicants rely on a previous practice of the Commission in taking decisions which they have not shown to have existed. As regards Commission Decision N 103/2007 of 25 November 2007 relating to the acquisition of digital decoders and the adaptation of existing communal television antennae in the Province of Soria (Spain), it has already been held that the Commission had expressly stated that the measure referred to in that decision allowed consumers to acquire any type of decoder, thanks to a subsidy which was independent of the technological platform that the consumer might wish to use and that it had expressly concluded that the measure was consistent with the principle of technological neutrality (judgment of 15 June 2010 in *Mediaset* v *Commission*, T-177/07, ECR, EU:T:2010:233, paragraph 103). In Decisions N 222/2006 of 22 September 2006 concerning aid for the reduction of the digital dividend in Sardinia (OJ 2007 C 68, p. 5) and SA.33980 of 5 December 2013 concerning local television in the United Kingdom, the authorities' choice was made on the basis of ex-ante studies, as is apparent from footnotes 85 and 86 of the contested decision. In those circumstances, the existence of a practice in taking decisions cannot be regarded as established. In any event, it is only in the context of Article 107(3)(c) TFEU that the legality of a Commission decision finding that aid does not satisfy the conditions for the application of that derogation must be assessed, not by reference to an alleged earlier practice (see judgment of 21 July 2011 in *Freistaat Sachsen and Land Sachsen-Anhalt* v *Commission*, C-459/10 P, EU:C:2011:515, paragraph 38 and the case-law cited).

130 In the fourth place, the applicants claim that the Commission did not examine whether the actual decisions of each Autonomous Community had been adopted in the light of the factual circumstances in their respective territories, and that the statement of reasons was therefore flawed. That argument must be rejected.

131 It should be pointed out that in recitals 90 to 93 of the contested decision, which refer to recitals 23 to 31 of that decision, the Commission described the legal basis of the aid at issue. It stated that the legal framework for the digital switch-over in Spain was a complex of various acts issued both by the Spanish Government and the Autonomous Communities and by the local authorities over a period of four years. According to the Commission, although the 2005 national technical plan in favour of DTT and the 2007 national plan for the transition to DTT mainly regulated the transition to DTT in Area I, they had also set the basis for further extension measures in Area II. The national technical plan in favour of DTT also authorised the local authorities, in partnership with the Autonomous Communities, to establish additional transmission centres necessary to ensure reception of DTT in Area II. Those extension measures were implemented by the regional authorities after a number of framework agreements and addenda to those framework agreements had been concluded with the Spanish Government. According to the Commission, in practice the Autonomous Communities had applied the Spanish Government's guidelines on the extension of DTT. The release of the State aid for the deployment of DTT in Area II was marked by the transfer of funds from the national and regional authorities to the beneficiaries.

132 It follows from the various legislative and administrative measures adopted by the Spanish authorities that the plan for the switch to digital television throughout the territory of the Kingdom of Spain using predominantly terrestrial technology was consistent with an initiative launched and coordinated by the central authority. It is common ground, as is apparent from recital 24 of the contested decision, that Law 10/2005, which marked the beginning of the rules on the switch to DTT, mentioned the need to promote a transition from analogue technology to DTT. As stated in recital 26 of that decision, the Spanish authorities envisaged, in an additional provision of the national technical plan in favour of DTT, the possibility that coverage would be extended by means of terrestrial technology in areas of low density population, provided that the local installation was in conformity with that plan. Recitals 28 to 32 of that decision, the content of which is not disputed by the applicants, describe the cooperation between the MITT and the Autonomous Communities through framework agreements and addenda to framework agreements in order to carry out digitisation in Area II. Those measures dealt, in particular, with joint financing by the Spanish Government of the extension of DTT coverage in that area.

133 In the light of the foregoing elements, the Commission cannot be criticised for having analysed the Spanish measures in favour of the deployment of DTT in Area II in the same context. As the different State interventions at national, regional and local levels must be analysed by reference to their effects, they were so closely linked in the present case that they could be regarded by the Commission as a single aid scheme granted by the public authorities in Spain. That is particularly so because the consecutive interventions in Spain, especially having regard to their chronology, their purpose and the situation in Area II, were so closely linked to each other that they were inseparable from one another (see, to that effect, judgment of 19 March 2013 in *Bouygues and Others* v *Commission and Others*, C-399/10 P and C-401/10 P, ECR, EU:C:2013:175, paragraphs 103 and 104).

134 Furthermore, in the case of an aid scheme, the Commission may confine itself to examining the characteristics of the scheme in question in order to determine, in the grounds of its decision, whether the scheme is appropriate for achieving one of the objectives referred to in Article 107(3) TFEU. Thus, in a decision which concerns such a scheme, the Commission is not required to carry out an analysis of the aid granted in individual cases under the scheme. It is only at the stage of recovery of the aid that it is necessary to look at the individual situation of each undertaking concerned (judgments of 7 March 2002 in *Italy* v *Commission*, C-310/99, ECR, EU:C:2002:143, paragraphs 89 and 91; in *Comitato 'Venezia vuole vivere' and Others* v *Commission*, cited in paragraph 88 above, EU:C:2011:368, paragraph 63; and of 13 June 2013 in *HGA and Others* v *Commission*, C-630/11 P to C-633/11 P, ECR, EU:C:2013:387, paragraph 114).

135 Furthermore, it is apparent from recital 114 of the contested decision that the Commission, in particular, examined the case of the Autonomous Community of the Basque Country, which had been put forward by the Spanish authorities as the best and only example to support their claim that there was no aid, in accordance with the criteria laid down by the Court of Justice in the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 18 above (EU:C:2003:415).

136 In the fifth place, the applicants take issue with the Commission for having ignored, when examining the proportionality of the measure, the allocation of powers between the public authorities by requiring that the Spanish Government should organise open calls for tenders for the whole of its territory.

137 In that regard, it should be observed that the Commission considered, in recital 166 of the contested decision, that, so far as proportionality was concerned, when designing the intervention for Area II, it would have been appropriate for the Spanish Government first to carry out a cost comparison or launch a call for tenders at national level. According to the Commission, if a call for tenders had been launched at national law, significant price reductions would have been achieved. The Commission stated that, although it was for the Spanish authorities to decide on their administrative organisation when providing funding from the Spanish Government, instead of pressing for the use of DTT, the Spanish Government could at least have encouraged the Autonomous Communities to launch calls for tenders, taking account of possible cost-saving efficiencies that could be achieved with certain platforms.

138 Those considerations are not vitiated by any manifest error. Far from disregarding the allocation of powers between the Spanish public authorities, the Commission merely pointed out that the Spanish Government could have encouraged the Autonomous Communities to take the possible reductions in prices that might result from coordinated action into account. Contrary to the applicants' assertion, the Commission did not require that a single open call for tenders for the entire Spanish territory be launched. As the switch to DTT had formed the subject-matter of different legislative and administrative measures adopted by the Spanish authorities at national level and as that transition had been funded in part by the budget of the Spanish Government (see paragraphs 2 to 8 above), it cannot be concluded that encouraging the Autonomous Communities to launch calls for tenders that took possible savings that could be achieved with certain platforms into account fails to respect the division of powers between the Spanish public authorities.

139 The first complaint must therefore be rejected.

– Second complaint, alleging that there were no unnecessary distortions of competition

140 The applicants claim that the measure at issue constituted a minimum measure necessary to achieve the object pursued while avoiding unnecessary distortions of competition. In their submission, in finding, in recital 170 of the contested decision, that there were unnecessary distortions of competition, the Commission breached the obligation to state reasons and made an error.

141 In that regard, it is sufficient to observe that recitals 153 to 169 of the contested decision show to the requisite legal standard that, in the Commission's view, there were unnecessary distortions of competition owing to the failure to respect the principle of technological neutrality, as, moreover, the applicants acknowledged in their application. The Commission therefore did not breach its obligation to state reasons. Furthermore, the argument whereby the applicants seek to show errors of assessment by the Commission concerning failure to respect the principle of technological neutrality has already been rejected (see paragraphs 102 to 139 above).

142 The second complaint must therefore be rejected.

143 It follows that the second part of the second plea and, accordingly, the plea in its entirety must be rejected.

Third plea, alleging an error of law in relation to the finding of new aid

144 The applicants claim that the Commission erred in law in that it considered that the measure at issue constituted new aid. In their submission, as the digitisation of the analogue network merely involved increasing its technical capacity, it constituted a non-substantial alteration of a possible existing aid and not new aid, since the initial deployment dated back to 1982, that is to say, before the accession of the Kingdom of Spain to the European Union.

145 It should be pointed out that the Commission considered, in recitals 173 to 175 of the contested decision, that the measure at issue constituted new aid that the Kingdom of Spain ought to have notified.

146 It should be borne in mind that Article 108 TFEU provides for different procedures according to whether the aid is existing or new. While under Article 108(3) TFEU new aid must be notified to the Commission and may not be implemented until that procedure has led to a final decision, under Article 108(1) TFEU existing aid may be lawfully implemented so long as the Commission has made no finding of incompatibility (see judgment in *P*, cited in paragraph 95 above, EU:C:2013:525, paragraph 36 and the case-law cited). Existing aid must therefore be regarded as lawful so long as the Commission has not found that it is incompatible with the internal market (see judgment in *P*, cited in paragraph 95 above, EU:C:2013:525, paragraph 41 and the case-law cited).

147 Article 1(b)(i) of Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1) provides that existing aid is to mean all aid which existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty. Under Article 1(c) of that regulation, all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid, must be considered to be new aid. In that regard, Article 4(1) of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation No 659/1999 (OJ 2004 L 140, p. 1) characterises as an alteration to existing aid for the purposes of Article 1(c) of Regulation No 659/1999 any change, other than alterations of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the internal market.

148 In essence, measures to implement aid or to alter existing aid constitute new aid. In particular, where the alteration affects the actual substance of the original scheme, the latter is transformed into a new aid scheme (see judgments of 30 April 2002 in *Government of Gibraltar* v *Commission*, T-195/01 and T-207/01, ECR, EU:T:2002:111, paragraphs 109 to 111; of 11 June 2009 in *AEM* v *Commission*, T-301/02, ECR, EU:T:2009:191, paragraph 121; and of 11 July 2014 in *Telefónica de España and Telefónica Móviles España* v *Commission*, T-151/11, ECR, EU:T:2014:631, paragraph 63).

149 In the present case, the Commission did not err in considering that the aid measure at issue constituted new aid on the ground that it had substantially altered the original scheme. It is common ground, as the Commission stated in recital 174 of the contested decision, that, in the early 1980s, at the time when the extension of the terrestrial network began to be financed, there were no private broadcasters on the market, that the extended infrastructure therefore served only the needs of the public broadcaster and that the extension of the existing terrestrial network, which at the time was the only platform for transmitting the television signal in Spain, therefore did not distort competition with other platforms.

150 By reference to that original scheme, the Commission was therefore entitled to consider, in recital 175 of the contested decision, that, since the beneficiary and the overall circumstances of public financing had changed substantially, the measure at issue could not be regarded as a formal or administrative alteration, but was an alteration affecting the actual substance of the original scheme. In that regard, the Commission was correct to observe that the legislation and the technology had developed, leading to new broadcasting platforms and new market players, in particular private broadcasters. As the Commission pointed out in recital 175, it is also necessary to take into account the fact that the switch from analogue television to digital television has become possible only because of recent technological progress, which took place after the accession of the Kingdom of Spain to the European Union. Contrary to the applicants' contention, the alteration of the original scheme was therefore not confined to improving the technical capacity of the existing network or merely to adding to the original scheme, but was of such a kind as to influence the evaluation of the compatibility of the aid measure at issue with the internal market.

151 The third plea must therefore be rejected and, accordingly, the action in its entirety must be dismissed.

Costs

152 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful, they must be ordered, in addition to bearing their own costs, to pay those relating to the main proceedings incurred by the Commission and by the intervener, in accordance with the forms of order sought by them. The costs relating to the proceedings for interim measures must be paid by the applicants, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders the Comunidad Autónoma del País Vasco and Itelazpi, SA to bear their own costs and to pay those relating to the main proceedings incurred by the European Commission and by SES Astra;**

3. **Orders the Comunidad Autónoma del País Vasco and Itelazpi to pay the costs relating to the proceedings for interim measures.**

Dittrich Schwarcz Tomljenović

Delivered in open court in Luxembourg on 26 November 2015.

[Signatures]

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