Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

6 October 2015 *

(Appeal — Competition — State aid — Aid granted by the Danish authorities to the public undertaking Danske Statsbaner (DSB) — Public service contracts for the supply of passenger rail transport services between Copenhagen (Denmark) and Ystad (Sweden) — Decision declaring the aid compatible with the internal market subject to conditions — Temporal application of rules of substantive law)

In Case C-303/13 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 3 June 2013,

European Commission, represented by L. Armati and T. Maxian Rusche, acting as Agents, with an address for service in Luxembourg,

appellant,

the other parties to the proceedings being:

Jørgen Andersen, residing in Ballerup (Denmark), represented by J. Rivas Andrés, G. van de Walle de Ghelcke and M. Nissen, avocats,

applicant at first instance,

supported by:

Dansk Tog, established in Copenhagen, represented by J. Rivas Andrés, G. van de Walle de Ghelcke and M. Nissen, avocats,

intervener in the appeal,

Kingdom of Denmark, represented by C. Thorning and V. Pasternak Jørgensen, acting as Agents, and by R. Holdgaard, advokat,

Danske Statsbaner SV (DSB), established in Copenhagen, represented by M. Honoré, advokat,

interveners at first instance,

* Language of the case: English.

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, L. Bay Larsen, T. von Danwitz, Presidents of Chambers, A. Rosas, A. Arabadjiev (Rapporteur), C. Toader, M. Safjan, D. Šváby, M. Berger, A. Prechal, E. Jarašiūnas, C.G. Fernlund and C. Lycourgos, Judges,

Advocate General: M. Wathelet,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 10 March 2015,

after hearing the Opinion of the Advocate General at the sitting on 21 May 2015,

gives the following

Judgment

1 By its appeal, the European Commission seeks to have set aside the judgment of the General Court of the European Union in *Andersen* v *Commission* (T-92/11, EU:T:2013:143, 'the judgment under appeal'), by which the General Court annulled in part Commission Decision 2011/3/EU of 24 February 2010 concerning public transport service contracts between the Danish Ministry of Transport and Danske Statsbaner (Case C 41/08 (ex NN 35/08)) (OJ 2011 L 7, p. 1, 'the decision at issue').

2 By their respective cross-appeals, Danske Statsbaner SV (DSB) ('DSB') and the Kingdom of Denmark also seek to have the judgment under appeal set aside.

Legal context

Regulation (EEC) No 1191/69

3 Under Article 5 of Council Regulation (EEC) No 1191/69 of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (OJ, English Special Edition, 1969(I), p. 276), as amended by Council Regulation (EEC) No 1893/91 of 20 June 1991 (OJ 1991 L 169, p. 1, 'Regulation No 1191/69'):

'1. Any obligation to operate or to carry shall be regarded as imposing economic disadvantages where the reduction in the financial burden which would be possible as a result of the total or partial termination of the obligation in respect of an operation or a group of operations affected by that obligation exceeds the reduction in revenue resulting from that termination.

...

2. A tariff obligation shall be regarded as entailing economic disadvantages where the difference between the revenue from the traffic to which the obligation applies and the financial burden of such traffic is less than the difference between the revenue which would be produced by that traffic and the financial burden thereof if working were on a commercial basis — account being taken both of the costs of those operations which are subject to the obligation and of the state of the market.'

4 Article 14(1) and (2) of that regulation provides:

‘1. “A public service contract” shall mean a contract concluded between the competent authorities of a Member State and a transport undertaking in order to provide the public with adequate transport services.

A public service contract may cover notably:

— transport services satisfying fixed standards of continuity, regularity, capacity and quality,

— additional transport services,

— transport services at specified rates and subject to specified conditions, in particular for certain categories of passenger or on certain routes,

— adjustments of services to actual requirements.

2. A public service contract shall cover, inter alia, the following points:

(a) the nature of the service to be provided, notably the standards of continuity, regularity, capacity and quality;

(b) the price of the services covered by the contract, which shall either be added to tariff revenue or shall include the revenue, and details of financial relations between the two parties;

(c) the rules concerning amendment and modification of the contract, in particular to take account of unforeseeable changes;

(d) the period of validity of the contract;

(e) the penalties in the event of failure to comply with the contract.’

5 The first subparagraph of Article 17(2) of that regulation provides:

‘Compensation paid pursuant to this Regulation shall be exempt from the preliminary information procedure laid down in Article 93(3) of the [EEC Treaty].’

Regulation (EC) No 1370/2007

6 Article 4(1) to (3) of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ 2007 L 315, p. 1) provides, in particular:

‘1. Public service contracts and general rules shall:

(a) clearly define the public service obligations with which the public service operator is to comply, and the geographical areas concerned;

(b) establish in advance, in an objective and transparent manner,

(i) the parameters on the basis of which the compensation payment, if any, is to be calculated, and

(ii) the nature and extent of any exclusive rights granted,

in a way that prevents overcompensation. In the case of public service contracts awarded in accordance with Article 5(2), (4), (5) and (6), these parameters shall be determined in such a way that no compensation payment may exceed the amount required to cover the net financial effect on costs incurred and revenues generated in discharging the public service obligations, taking account of revenue relating thereto kept by the public service operator and a reasonable profit;

(c) determine the arrangements for the allocation of costs connected with the provision of services. These costs may include in particular the costs of staff, energy, infrastructure charges, maintenance and repair of public transport vehicles, rolling stock and installations necessary for operating the passenger transport services, fixed costs and a suitable return on capital.

2. Public service contracts and general rules shall determine the arrangements for the allocation of revenue from the sale of tickets which may be kept by the public service operator, repaid to the competent authority or shared between the two.

3. The duration of public service contracts shall be limited and shall not exceed … 15 years for passenger transport services by rail or other track-based modes. …'

7 Article 5(1), (3) and (6) of that regulation states:

'1. Public service contracts shall be awarded in accordance with the rules laid down in this Regulation. …

…

3. Any competent authority which has recourse to a third party other than an internal operator, shall award public service contracts on the basis of a competitive tendering procedure, except in the cases specified in paragraphs … and 6. The procedure adopted for competitive tendering shall be open to all operators, shall be fair and shall observe the principles of transparency and non-discrimination. Following the submission of tenders and any preselection, the procedure may involve negotiations in accordance with these principles in order to determine how best to meet specific or complex requirements.

…

6. Unless prohibited by national law, competent authorities may decide to make direct awards of public service contracts where they concern transport by rail, with the exception of other track-based modes such as metro or tramways. In derogation from Article 4(3), such contracts shall not exceed 10 years …'

8 Article 6 of that regulation provides:

'1. All compensation connected with a general rule or a public service contract shall comply with the provisions laid down in Article 4, irrespective of how the contract was awarded. All compensation, of whatever nature, connected with a public service contract awarded directly in accordance with Article 5 … or (6) or connected with a general rule shall also comply with the provisions laid down in the Annex.

2. At the written request of the Commission, Member States shall communicate, within a period of three months or any longer period as may be fixed in that request, all the information that the Commission considers necessary to determine whether the compensation granted is compatible with this Regulation.'

9 Article 8 of that regulation, entitled, 'Transition', states in paragraphs 2 and 3:

'2. Without prejudice to paragraph 3, the award of public service contracts by rail and by road shall comply with Article 5 as from 3 December 2019. During this transitional period Member States shall take measures to gradually comply with Article 5 in order to avoid serious structural problems in particular relating to transport capacity.

Within six months after the first half of the transitional period, Member States shall provide the Commission with a progress report, highlighting the implementation of any gradual award of public service contracts in line with Article 5. On the basis of the Member States' progress reports, the Commission may propose appropriate measures addressed to Member States.

3. In the application of paragraph 2, no account shall be taken of public service contracts awarded in accordance with Community and national law:

(a) before 26 July 2000 on the basis of a fair competitive tendering procedure;

(b) before 26 July 2000 on the basis of a procedure other than a fair competitive tendering procedure;

(c) as from 26 July 2000 and before 3 December 2009 on the basis of a fair competitive tendering procedure;

(d) as from 26 July 2000 and before 3 December 2009 on the basis of a procedure other than a fair competitive tendering procedure.

The contracts referred to in (a) may continue until they expire. The contracts referred to in (b) and (c) may continue until they expire, but for no longer than 30 years. The contracts referred to in (d) may continue until they expire, provided they are of limited duration comparable to the durations specified in Article 4.

Public service contracts may continue until they expire where their termination would entail undue legal or economic consequences and provided that the Commission has given its approval.'

10 According to Article 9(1) of Regulation No 1370/2007:

'Public service compensation for the operation of public passenger transport services or for complying with tariff obligations established through general rules paid in accordance with this Regulation shall be compatible with the common market. Such compensation shall be exempt from the prior notification requirement laid down in Article 88(3) [EC].'

11 Article 10(1) of that regulation provides:

'Regulation … No 1191/69 is hereby repealed. ...'

12 In accordance with Article 12, Regulation No 1370/2007 entered into force on 3 December 2009.

Background to the dispute

13 Mr Andersen provides bus transport services in Denmark and abroad under the trade name of Gråhundbus v/Jørgen Andersen. He operates, in particular, a route between Copenhagen (Denmark) and Ystad (Sweden). Ystad is connected by ferry to the island of Bornholm (Denmark).

14 DSB is the incumbent rail transport operator in Denmark. At the material time, DSB was wholly owned by the Danish State and operated railway passenger transport and related services only.

15 Since the abolition of DSB's monopoly on 1 January 2000, there have been two schemes in Denmark for the provision of passenger rail transport services: free traffic, operated on a commercial basis, and public service traffic, governed by public service contracts which may provide for the payment of compensation in respect of the routes operated.

16 During the period from 2000 to 2004, DSB was awarded a public transport service contract relating to long-distance and regional lines. From 15 December 2002, that contract also covered the route between Copenhagen and Ystad, which had previously been subject to a free traffic system.

17 During the period from 2005 to 2014, DSB was awarded a new public transport service contract concerning long-distance and regional lines, international routes to and from Germany and the route between Copenhagen and Ystad.

18 Following the filing of two complaints, one of which was made by Mr Andersen, concerning the public service contracts awarded to DSB, the Commission decided on 10 September 2008 to initiate the formal review procedure laid down in Article 88(2) EC ('the initiating decision'). At the end of that procedure, on 24 February 2010, it adopted the decision at issue, Articles 1 to 3 of which read as follows:

'Article 1

The public transport service contracts concluded between the Danish Ministry of Transport and [DSB] constitute State aid within the meaning of Article 107(1) [TFEU].

The State aid is compatible with the internal market pursuant to Article 93 [TFEU] in so far as the conditions of Articles 2 and 3 of this Decision are complied with.

Article 2

Denmark shall introduce into all current public transport service contracts with [DSB] the refund mechanism described in recitals 222 to 240 and 356 of this Decision, the principal characteristics of which are as follows:

— Adjustment of the contractual payments at the end of the financial year by determining a gross reduction calculated on the basis of the following formula:

Total revenue — reasonable profit — Total expenditure = gross reduction

— Modulation of the gross reduction to take account of efficiency gains and improvements in quality of service according to the following formula and parameters:

Refund mechanism = gross reduction — corrections (Costs Δ. + Pas.km Δ) = net reduction

— Cost Δ: reduction in costs (per passenger-kilometre) compared with the average cost over the past 4 years in accordance with the calculation: differential in cost per passenger-kilometre (as a percentage) compared with the average cost over the last 4 years multiplied by a total cost basis, and

— Pas.km Δ: increase in passenger traffic measured in terms of passenger-kilometres (DKK [(Danish kroner)] 0.80 per passenger-kilometre),

— the total reductions on account of improvements in performance may not exceed the gross reduction in a given year. The net reduction is therefore between zero and the gross reduction.

— Introduction of an upper limit on the refund mechanism making it possible to guarantee that the profit is maintained at a reasonable level according to the following formula and characteristics:

Reasonable profit (6%) + corrections (Cost Δ. + Pas.km Δ) / Equity capital < 12%

— the calculation takes account only of the share of equity capital corresponding to DSB's public service activity,

— the upper limit on the reasonable profit is fixed at a 12% return on equity, but with a maximum of 10% over 3 years.

Article 3

Any compensation due to DSB from Ansaldo Breda on account of the late delivery of rolling stock should be repaid to the Danish State.'

Procedure before the General Court and the judgment under appeal

19 By application lodged at the General Court Registry on 18 February 2011, Mr Andersen brought an action for annulment of the second paragraph of Article 1 of the decision at issue.

20 By documents lodged at the General Court Registry on 23 May 2011, the Kingdom of Denmark and DSB sought leave to intervene in the proceedings in support of the form of order sought by the Commission. By orders of 22 June 2011, the President of the Fifth Chamber of the General Court granted leave to intervene.

21 Mr Andersen put forward three pleas in law in support of the action, the third alleging that, in applying Regulation No 1370/2007 to the facts of the case instead of Regulation No 1191/69, the Commission had made an error of law.

22 The General Court upheld that third plea and consequently annulled the second paragraph of Article 1 of the decision at issue.

23 After recalling, in paragraph 40 of the judgment under appeal, that, in the case of aid which has been paid without prior notification, the applicable rules are those in force at the time when the aid was paid, the General Court held, in paragraphs 46 and 48 of that judgment, that in the case before it the compatibility of the aid in question with the internal market should have been assessed under the substantive rules in force on the date on which it was paid, namely under Regulation No 1191/69, and that, in having applied Regulation No 1370/2007 for that purpose, the Commission had erred in law.

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

24 By document lodged at the Court Registry on 30 September 2013, Dansk Tog, an association governed by Danish law established in Copenhagen, applied, on the basis of the second paragraph of Article 40 of the Statute of the Court of Justice of the European Union, for leave to intervene in the present case in support of the form of order sought by Mr Andersen. By order of 3 April 2014, the President of the Court granted that application.

25 The Commission, by its appeal, and DSB, by its cross-appeal, claim that the Court should:

— principally, set aside the judgment under appeal, dismiss the application for annulment of the decision at issue and order Mr Andersen to pay the costs;

— in the alternative, declare the third plea in law put forward at first instance unfounded, refer the case back to the General Court and reserve costs.

26 By its cross-appeal, the Kingdom of Denmark claims that the Court should:

— set aside the judgment under appeal, and

— rule that the Commission's erroneous application of Regulation No 1370/2007 does not justify the annulment of the decision at issue.

27 Mr Andersen contends that the Court should:

— principally, dismiss the appeal and the cross-appeals and order the Commission, DSB and the Kingdom of Denmark to pay the costs incurred as a result of their respective appeal and cross-appeals;

— in the alternative, refer the case back to the General Court.

28 Dansk Tog contends that the Court should:

— principally, dismiss the appeal and the cross-appeals;

— in the alternative, refer the case back to the General Court;

— order the Commission, DSB and the Kingdom of Denmark to pay its costs.

Request for the reopening of the oral procedure

29 The oral procedure was closed on 21 May 2015 following the delivery of the Opinion of the Advocate General.

30 By letter of 10 July 2015, received at the Court on the same day, DSB requested the Court to order that the oral procedure be reopened.

31 In support of that request, DSB argued that the Opinion of the Advocate General was based on legal considerations which the parties to the proceedings had not been able to debate sufficiently.

32 In that regard, it must be noted that, first, the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in accordance with Article 83 of its Rules of Procedure, in particular if it considers that it lacks sufficient information or where the case

must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice (judgment in *Commerz Nederland*, C-242/13, EU:C:2014:2224, paragraph 26).

33 Secondly, pursuant to the second paragraph of Article 252 TFEU, it is the duty of the Advocate General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice, require the Advocate General's involvement. The Court is not bound either by the Advocate General's Opinion or by the reasoning on which it is based (judgment in *Commission and Others* v *Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraph 57).

34 In the present case, the Court, having heard the Advocate General, considers that it has sufficient information to adjudicate and that the case does not need to be decided on the basis of arguments which have not been debated between the parties. It is not necessary, therefore, to grant the request to reopen the oral procedure.

The appeal

Arguments of the parties

35 In support of its appeal, the Commission relies on a single plea in law, alleging that, in criticising it for having applied Regulation No 1370/2007 retroactively to the facts of the case, the General Court infringed Articles 108(2) and (3) TFEU, 288 TFEU and 297(1) TFEU.

36 The Commission notes that the Court has consistently held, first, that new rules apply immediately to the future effects of a situation which arose under the old rule and, secondly, that in order to ensure observance of the principles of legal certainty and the protection of legitimate expectations, the substantive rules of EU law must be interpreted as applying to situations existing before their entry into force only in so far as it clearly follows from their terms, their objectives or their general scheme that such effect must be given to them.

37 The Commission observes that only the second hypothesis constitutes a retroactive application of the new rule, and therefore maintains that the decisive question in the present case is whether unlawful aid falls within one hypothesis or the other.

38 The Commission states that the Court held in its judgment in *Commission* v *Freistaat Sachsen* (C-334/07 P, EU:C:2008:709) that the Commission can apply a new rule to any proposed aid, including where that aid is notified prior to the entry into force of that new rule.

39 In paragraphs 51 and 52 of that judgment, the Court held that the rules, principles and criteria of assessment of the compatibility of State aid in force at the date on which the Commission takes its decision on compatibility may, as a rule, be regarded as better adapted to the context of competition, and that the notification of proposed aid is only a procedural obligation which cannot have the effect of setting the legal framework applicable to the aid notified.

40 The Court thus held, in paragraph 53 of that judgment, that the notification by a Member State of aid does not give rise to a definitively established situation which requires the Commission to rule on its compatibility with the internal market by applying the rules in force at the date on which that notification took place.

41 The Commission adds that the Court observed in the judgment in *Diputación Foral de Vizcaya and Others* v *Commission* (C-465/09 P to C-470/09 P, EU:C:2011:372, paragraphs 125 and 128), first of all, that the application of new rules to unlawful aid does not concern a previously existing situation but an ongoing situation; next, that the effective application of competition policy requires that the Commission may at any time adjust its assessment to the needs of that policy; and, lastly, that a Member State which has not notified an aid scheme to the Commission cannot reasonably expect that that scheme will be assessed in the light of the rules applicable at the time of its adoption.

42 According to the Commission, in paragraph 55 of the judgment under appeal, the General Court wrongly distinguished the present case from that giving rise to the judgment in *Diputación Foral de Vizcaya* v *Commission* (C-465/09 P to C-470/09 P, EU:C:2011:372). While it is true that that judgment concerned the legality of transitional rules laid down in guidelines adopted by the Commission, the Court's reasoning is broader in scope and applies *a fortiori* to regulations and other binding legal acts. Moreover, the Commission submits that it is clear from that judgment that the Court did not consider the guidelines to have been applied retroactively.

43 Consequently, the Commission is of the opinion that, in having relied, in paragraphs 40 to 43 and 46 to 48 of the judgment under appeal, on the judgments in *SIDE* v *Commission* (T-348/04, EU:T:2008:109, paragraphs 58 to 60) and *Italy* v *Commission* (T-3/09, EU:T:2011:27, paragraph 61), the General Court made an error of law.

44 In the Commission's submission, the Court wrongly ruled in those judgments that the compatibility with the internal market of non-notified aid must be measured against the rules in force as at the date on which the aid was granted, given that the distinction made by the General Court between aid that has been notified and unlawful aid is not relevant in law.

45 The Commission explains that the situation in relation to the grant of aid, whether notified or not, cannot be regarded as definitive until the Commission has taken its decision on the compatibility of that aid with the internal market and that decision has become final. First of all, recovery of such aid could be ordered at any time by the Commission or by the national court until such time as the Commission has approved it and the approval decision has become final. Next, a Member State acting in breach of the notification and suspension obligations laid down in Article 108(3) TFEU cannot be treated more favourably than a Member State that has fulfilled those obligations. Lastly, there is no requirement to protect the recipient of unlawful aid from a change in the substantive rules applicable to the Commission's assessment of the compatibility of that aid.

46 The Commission thus regards the General Court as having erred in finding that the advantages and disadvantages created by the grant of the aid in question arose during the period in which that aid was paid.

47 As Advocate General Alber stated in his Opinion in Joined Cases *Falck and Acciaierie di Bolzano* v *Commission* (C-74/00 P and C-75/00 P, EU:C:2002:106, points 143 and 144), the effect of unlawful aid persists until its recovery, since it permanently strengthens the competitive position of the recipient as compared to its competitors.

48 Mr Andersen and Dansk Tog dispute those arguments.

Findings of the Court

49 According to the settled case-law of the Court, new rules apply, as a matter of principle, immediately to the future effects of a situation which arose under the old rule. The Court has also held that the principle of legitimate expectations cannot be extended to the point of generally preventing a new rule from applying to the future effects of situations which arose under the earlier rule (judgment in *Commission* v *Freistaat Sachsen*, C-334/07 P, EU:C:2008:709, paragraph 43 and the case-law cited).

50 By contrast, in order to ensure observance of the principles of legal certainty and the protection of legitimate expectations, the substantive rules of EU law must be interpreted as applying to situations existing before their entry into force only in so far as it clearly follows from their terms, their objectives or their general scheme that such effect must be given to them (judgments in *Pokrzeptowicz-Meyer*, C-162/00, EU:C:2002:57, paragraph 49, and *Commission* v *Freistaat Sachsen*, C-334/07 P, EU:C:2008:709, paragraph 44).

51 As regards the question whether the aid at issue falls within the scope of a situation existing before the date of the entry into force of Regulation No 1370/2007 or of a situation which arose under Regulation No 1191/69 but the effects of which still applied at that date, it must be borne in mind that, under the transitional provisions set out in Article 8(3) of Regulation No 1370/2007, public service contracts in existence on 3 December 2009 '[could] continue until they expire[d]', subject to the maximum periods laid down by that provision and subject to those contracts having been 'awarded in accordance with Community and national law'.

52 Under Article 17(2) of Regulation No 1191/69, compensation paid to a transport undertaking in respect of the financial burdens arising from its public service obligation was exempt from the notification obligation provided for in Article 108(3) TFEU if that compensation satisfied the conditions laid down in Sections II, III and IV of that regulation. Such aid was regarded by that regulation as being compatible with the internal market.

53 It follows that aid paid to a public transport undertaking on the date at which Regulation No 1191/69 was still in force and which complied with the conditions laid down in Sections II, III and IV of that regulation fell within the scope of a situation definitively existing before the entry into force of Regulation No 1370/2007.

54 It follows from those considerations that when it adopted the decision at issue, the Commission ought first to have examined in the light of Regulation No 1191/69 the aid paid under the first public transport service contract concluded for the years 2000 to 2004 and the aid paid before 3 December 2009 under the second public transport service contract concluded for the years 2005 to 2014, in order to ascertain whether that aid complied with the conditions laid down in Sections II, III and IV of that regulation and was thus exempt from the notification obligation provided for in Article 108(3) TFEU.

55 By contrast, the Commission ought to have examined in the light of Regulation No 1370/2007 and subject to the transitional rules mentioned in paragraph 51 of the present judgment both the legality and the compatibility with the internal market of the aid paid from 3 December 2009 under the second public transport service contract concluded for the years 2005 to 2014.

56 That conclusion is not affected by the case-law of the Court to which the Commission refers.

57 First, the Commission cannot base any argument on paragraphs 51 and 52 of the judgment in *Commission* v *Freistaat Sachsen* (C-334/07 P, EU:C:2008:709), since the circumstances of the present case are fundamentally different from those of the case giving rise to that judgment, a case which concerned State aid that was not caught by a block exemption regulation at the time when the competent national authorities decided to grant it.

58 Secondly, for the same reasons, paragraphs 125 to 128 of the judgment in *Diputación Foral de Vizcaya and Others* v *Commission* (C-465/09 P to C-470/09 P, EU:C:2011:372) do not in any way support the Commission's view that the aid at issue in the present case had to be assessed in the light of Regulation No 1370/2007 alone.

59 Thirdly, with regard to the argument that the recovery of unlawful aid could be ordered until such time as the Commission adopted a decision relating to that aid, it must be noted that, in this instance, the unlawfulness of the aid at issue has not been established.

60 That said, it is clear from the findings in paragraphs 54 and 55 of the present judgment that the General Court erred in law in ruling, in paragraph 46 of the judgment under appeal, that the compatibility with the internal market of all the aid at issue should have been assessed under Regulation No 1191/69.

61 The judgment under appeal must, therefore, be set aside in so far as, by that judgment, as regards the aid paid from 3 December 2009 under the second public transport service contract concluded for the years 2005 to 2014, the General Court annulled the second paragraph of Article 1 of the decision at issue.

62 Accordingly, the case must be referred back to the General Court for judgment, in the light of the three pleas of the application, taking account of Article 8(3) of Regulation No 1370/2007, on the legality of the decision at issue in so far as it declared that the aid paid from 3 December 2009 under the second public transport service contract concluded for the years 2005 to 2014 was compatible with the internal market.

63 The appeal is dismissed as to the remainder.

The cross-appeals

Arguments of the parties

64 DSB submits that the presumably erroneous application of Regulation No 1370/2007 to the facts of the case has not affected the legality of the decision at issue, as the application of Regulation No 1191/69 would not have led to a different conclusion as to the compatibility of the aid in question.

65 DSB states that, in paragraph 398 of the decision at issue, the Commission referred to the assessment rules in Regulation No 1191/69, which the Commission had already set out in paragraphs 124 to 131 of the initiating decision. In those paragraphs, the Commission had examined Article 14 of Regulation No 1191/69 and concluded that the compatibility assessment in respect of that aid had to be carried out in the light of the general principles flowing from the EC Treaty, case-law and the Commission's practice in taking decisions.

66 In particular, the Commission had indicated that those general principles required that the amount of compensation could not exceed what was necessary to cover the costs incurred in discharging the public service obligations, taking into account the relevant receipts and reasonable profit for discharging those obligations. Lastly, the Commission had set out its preliminary views as to whether or not that legal test was satisfied with regard to the aid in question.

67 Thus, a combined reading of the decision at issue and the initiating decision would explain in a sufficiently reasoned manner why the application of Regulation No 1191/69 could not have led to a different outcome from that arising from the application of Regulation No 1370/2007. DSB states that, according to settled case-law, a statement of reasons for a decision is sufficient if it refers to a

document which is already in the addressee's possession and which contains the matters on which the institution based its decision (judgment in *Bundesverband deutscher Banken* v *Commission*, T-36/06, EU:T:2010:61, paragraph 53 and the case-law cited).

68 Consequently, DSB submits that the General Court erred in law in stating, in paragraph 50 of the judgment under appeal, that the assessment of the aid in question was carried out solely on the basis of Regulation No 1370/2007 and, in paragraph 58 of that judgment, that it could not substitute its own assessment for that of the Commission or decide whether the aid in question was, on the basis of Regulation No 1191/69, compatible with the internal market.

69 According to DSB, the General Court was, on the contrary, required to consider whether the Commission's interpretation of Regulation No 1191/69 and the conclusions drawn from that interpretation were correct. In that regard, DSB notes that, according to settled case-law, an error of law does not justify the annulment of a decision where, if the error had not been committed, the Commission would have adopted the same decision (judgments in *Falck and Acciaierie di Bolzano* v *Commission*, C-74/00 P and C-75/00 P, EU:C:2002:524, paragraph 122; *CMA CGM and Others* v *Commission*, T-213/00, EU:T:2003:76, paragraphs 101 to 103; *González y Díez* v *Commission*, T-25/04, EU:T:2007:257, paragraph 74; and *Diputación Foral de Álava and Others* v *Commission*, T-30/01 to T-32/01 and T-86/02 to T-88/02, EU:T:2009:314, paragraph 219).

70 The Danish Government maintains that, in paragraph 50 of the judgment under appeal, the General Court distorted the substance of the decision at issue by holding that the assessment of the aid in question had been carried out only on the basis of Regulation No 1370/2007. The Danish Government's line of argument is essentially identical to that of DSB, as summarised in paragraphs 65 to 67 of the present judgment.

71 Furthermore, the Danish Government submits that the General Court infringed EU law by rejecting, in paragraph 58 of the judgment under appeal, the Danish Government's arguments and those of the Commission and DSB aimed at demonstrating that the application of Regulation No 1370/2007 was merely a procedural irregularity which had no effect on the substance of the decision at issue. In support of that argument, the Danish Government invokes the judgments in *González y Díez* v *Commission* (T-25/04, EU:T:2007:257, paragraph 74) and *Diputación Foral de Álava and Others* v *Commission* (T-30/01 to T-32/01 and T-86/02 to T-88/02, EU:T:2009:314, paragraph 219).

72 The Commission supports the arguments both of DSB, with the exception of that summarised in paragraph 69 of the present judgment, and of the Danish Government, as summarised in paragraph 70 of the present judgment.

73 Mr Andersen challenges the arguments of DSB and of the Danish Government. In particular he contends that, in finding that the Commission had carried out the compatibility assessment solely on the basis of Regulation No 1370/2007, the General Court made an assessment of the facts that cannot be challenged in the present appeal.

Findings of the Court

74 As regards the admissibility of the line of argument that the Commission examined the compatibility of the aid in question in the light of both Regulation No 1191/69 and Regulation No 1370/2007 and not, contrary to the General Court's erroneous interpretation of the decision at issue, solely in the light of Regulation No 1370/2007, suffice it to note that such an interpretation is within the scope of a legal assessment and not of a mere finding of fact. Accordingly, that line of argument is admissible.

75 With regard to the substance, it is evident from paragraphs 304, 307, 314 and 397 of the decision at issue that the Commission expressly stated that the examination of the compatibility of the aid in question was to be based solely on Regulation No 1370/2007. In addition, paragraphs 315 to 394 of that decision make clear that the Commission did indeed carry out that examination solely in the light of that regulation.

76 While it is true that, in paragraph 398 of the decision at issue, the Commission stated that the application of Regulation No 1191/69 would not have led to a different conclusion from that drawn from the application of Regulation No 1370/2007, such a statement does not, by itself, serve to establish that the Commission did indeed apply Regulation No 1191/69 in order to assess the compatibility of the aid in question, as the Commission, the Danish Government and DSB assert.

77 Furthermore, while the Commission noted in paragraph 398 of the decision at issue that the substantive rules in Regulation No 1191/69 'correspond[ed]' to those in Regulation No 1370/2007, it did not thereby find that they were identical, and therefore, in any event, the conditions for the application of the case-law of the General Court on which DSB and the Danish Government rely, namely the judgments in *González y Díez* v *Commission* (T-25/04, EU:T:2007:257, paragraph 74) and *Diputación Foral de Álava and Others* v *Commission* (T-30/01 to T-32/01 and T-86/02 to T-88/02, EU:T:2009:314, paragraph 219), are not met in the present case.

78 As regards the fact that, in paragraph 398 of the decision at issue, the Commission referred to the fact that it had set out and interpreted in the initiating decision the assessment rules in Regulation No 1191/69, suffice it to note that, contrary to what is claimed by DSB and the Danish Government, the initiating decision does not contain any assessment that would make up for the absence in the decision at issue of any examination of the aid in question in the light of that regulation.

79 In paragraphs 83 to 90 and 101 to 103 of the initiating decision, concerning the question of the existence of State aid, and in paragraphs 129 to 131 of that decision, concerning any compatibility of that aid with Regulation No 1191/69, the Commission merely outlined the arguments of the parties and stated that it harboured doubts as to the merits of the arguments put forward by DSB and by the Danish Government.

80 Consequently, the conditions for the application of the case-law referred to by DSB — namely the judgment in *Bundesverband deutscher Banken* v *Commission* (T-36/06, EU:T:2010:61, paragraph 53 and the case-law cited), according to which a statement of reasons for a decision is sufficient if it refers to a document which is already in the addressee's possession and which contains the matters on which the institution based its decision — are also not met.

81 Accordingly, if the General Court had ascertained, as it was required to do in DSB's opinion, that the statement in paragraph 398 of the decision at issue, according to which the application of Regulation No 1191/69 in the present case would not have led to a different conclusion, was well founded, it would have been required to carry out at the outset an assessment of the compatibility of the aid at issue in the light of that regulation.

82 The Court has consistently held that, in the context of an action for annulment, such an examination is not within the purview of the General Court, since the General Court must not substitute its own economic assessment for that of the Commission (see, to that effect, order in *DSG* v *Commission*, C-323/00 P, EU:C:2002:260, paragraph 43, and judgment in *KME Germany and Others* v *Commission*, C-272/09 P, EU:C:2011:810, paragraphs 93 and 103).

83 In those circumstances, the cross-appeals must be dismissed.

Costs

84 Since the case is to be referred back to the General Court, the costs must be reserved.

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

1. **Sets aside the judgment of the General Court of the European Union in *Andersen* v *Commission* (T-92/11, EU:T:2013:143) in so far as, by that judgment, as regards the aid paid from 3 December 2009 under the second public transport service contract concluded for the years 2005 to 2014, the General Court annulled the second paragraph of Article 1 of Commission Decision 2011/3/EU of 24 February 2010 concerning public transport service contracts between the Danish Ministry of Transport and Danske Statsbaner (Case C 41/08 (ex NN 35/08));**

2. **Dismisses the appeal as to the remainder;**

3. **Dismisses the cross-appeals;**

4. **Refers the case back to the General Court of the European Union for judgment, in the light of the three pleas of the application, taking account of Article 8(3) of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70, on the legality of Decision 2011/3 in so far as it declared that the aid paid from 3 December 2009 under the second public transport service contract concluded for the years 2005 to 2014 was compatible with the internal market;**

5. **Reserves the costs.**

[Signatures]