Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 21 May 2015[1]

Case C-303/13 P

European Commission
v

Jørgen Andersen

(Appeals — State aid — Aid granted by the Danish authorities to the public undertaking Danske Statsbaner (DSB) — Public service contracts for the supply of rail passenger 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)

1. By the present appeal, the European Commission seeks, primarily, to have set aside the judgment in *Andersen* v *Commission* (T-92/11, EU:T:2013:143, 'the judgment under appeal'), by which the General Court of the European Union partially annulled the Commission decision concerning public transport service contracts between the Danish Ministry of Transport and Danske Statsbaner (DSB),[2] and the dismissal of the application to annul the decision at issue. In the alternative, the Commission asks the Court to declare that the third plea raised at first instance is unfounded and to refer the case back to the General Court. This appeal concerns the temporal application of the substantive rules on State aid and reveals the complexity of the matter. In particular, it raises the question whether the non-notified State aid at issue in this case relates, in respect of the years 2002 to 2008, to a previously existing situation, as the General Court found, in essence, or to an ongoing situation, as the Commission argues. By their cross-appeals, Danske Statsbaner (DSB) ('DSB') and the Kingdom of Denmark also request that the Court set aside the judgment under appeal.

I – **Background to the dispute**

2. 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), which is connected by ferry to the island of Bornholm (Denmark). DSB is the incumbent rail transport operator in Denmark. At the time of the facts at issue, DSB was wholly owned by the Danish State and operated railway passenger transport and related services only.

3. 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: the free traffic scheme, operated on a commercial basis, and the public service traffic scheme, governed by public service contracts which may provide for the payment of compensation in respect of the routes operated.

1 — Original language: French.

2 — Decision 2011/3/EU of 24 February 2010 (Case C 41/08 (ex NN 35/08)) (OJ 2011 L 7, p. 1, 'the decision at issue').

4. 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. For the period from 2005 to 2014, DSB was awarded a new public transport service contract concerning long-distance and regional lines as well as the international connections with Germany and the route between Copenhagen and Ystad.

5. Following two complaints, including that of Mr Andersen, against the public service contracts awarded to DSB, the Commission decided, on 10 September 2008, to initiate the formal review procedure provided for in Article 88(2) EC ('the initiating decision'). At the end of that procedure, it adopted the decision at issue on 24 February 2010, Article 1 of which reads as follows:

'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'.

II – **Proceedings before the General Court and the judgment under appeal**

6. In support of his action for annulment of the decision at issue, Mr Andersen raised three pleas in law, the first alleging an error of law in that the Commission considered that the Danish Government did not commit a manifest error of assessment in classifying the Copenhagen-Ystad route as a 'public service' and including it in the scheme of public service contracts, the second alleging an error of law in that the Commission did not order recovery of the incompatible overcompensation resulting from the dividends paid by DSB to its shareholder, the Danish State, and the third alleging an error of law in that the Commission applied Regulation (EC) No 1370/2007,[3] which he claimed was inapplicable *ratione temporis*, instead of Regulation (EEC) No 1191/69,[4] which he claimed was applicable *ratione temporis*. The General Court upheld the third plea and consequently annulled the second paragraph of Article 1 of the decision at issue.

III – **Procedure before the Court of Justice**

7. By order of 3 April 2014, the President of the Court allowed the intervention of Dansk Tog, an association governed by Danish law, established in Copenhagen, in support of the form of order sought by Mr Andersen. At the hearing which took place on 10 March 2015, the Commission, Mr Andersen, Dansk Tog, the Kingdom of Denmark and DSB submitted their observations (the last two parties having also intervened before the General Court in support of the form of order sought by the Commission).

3 — Regulation 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).

4 — Regulation of the Council 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 (1), p. 276).

IV – **Assessment**

A – *The Commission's appeal*

8. First of all, it should be noted that DSB and the Danish Government lodged two identical sets of written pleadings, the first entitled 'response' and the second entitled 'cross-appeal'. As all of those pleadings seek to have the judgment under appeal set aside, the responses must be deemed inadmissible in that they do not seek to have the appeal allowed or dismissed, as required by Article 174 of the Court's Rules of Procedure. The arguments put forward by DSB and the Danish Government will therefore be included only in the sections relating to their respective cross-appeals.

1. Summary of the arguments of the parties

9. The Commission considers that the assessment of the aid in question on the basis of Regulation No 1370/2007 did not entail a retroactive application of that regulation but was consistent with the principle of immediate application.

10. Mr Andersen considers, in essence, that, rules of law do not in principle apply retroactively, but that the legislature may, exceptionally, confer retroactive effect on a legal measure. Aid such as the aid at issue in this case is intended to subsidise the continuation of a given activity which, without the aid, would be loss-making and therefore probably abandoned. In those circumstances, the most suitable rule would be the rule which was applicable at the time when the aid was granted and produced its effects on competition (which is also clear from the case-law on unlawful aid).

11. Dansk Tog considers that temporal application of the law, if it is not to be arbitrary, must be determined on the basis of the only objective factor, namely the time when the aid was granted and produced its effects on the market. The criterion proposed by the Commission would enable it arbitrarily to decide the law applicable by accelerating or delaying its decision. Moreover, Dansk Tog is not convinced that the application of Regulation No 1191/69 would have had the same result as the application of Regulation No 1370/2007.

2. Analysis

a) Case-law on the temporal application of substantive rules

12. First of all, it is important to distinguish between retroactivity ('echte Rückwirkung')[5] and immediate application ('unechte Rückwirkung').

13. Then, it is necessary to draw a distinction between, on the one hand, the application of a new rule to the future effects of a situation which arose under the old rule (temporary situation)[6] and, on the other hand, the application of that rule to a definitively existing situation under the old rule (existing situation).

5 — Retroactive application may run counter to the general principles of protection of legitimate expectations and legal certainty. On the latter, see Skouris, V., 'Legal certainty in the Community legal order', in *Mélanges Michael P. Stathopoulos* (Τιμητικός Τόμος Μιχ. Π. Σταθοπούλου, Τόμος ΙΙ, Αθήνα-Κομοτηνή), Volume II, Athens-Komotini, 2010, p. 2507. See, in that context, inter alia, Lipinsky, J., 'Man of Steel? The General Court and the Principle of Legal Certainty: Annotation on the Judgment in Case T-308/00 RENV, Salzgitter AG', *European State Aid Quarterly*, 2/2014, p. 368.

6 — The term 'temporary situation' is used, inter alia, in the judgment in *Ferriere Nord* v *Commission* (T-176/01, EU:T:2004:336, paragraph 139), in order to distinguish between the two situations. The term 'temporary situation' might also be used to designate the opposite of a '*previously existing*' situation.

14. The Court has long considered that 'according to a generally accepted principle, the laws amending a legislative provision apply, unless otherwise provided, to the future consequences of situations which arose under the former law'.[7]

15. Moreover, 'while the principle of the protection of legitimate expectations is one of the fundamental principles of the Community, it is settled case-law that this principle cannot be extended to the point of generally preventing new rules from applying to the future consequences of situations which arose under the earlier rules' (see, inter alia, judgment in *Butterfly Music*, C-60/98, EU:C:1999:333, paragraph 25).

16. As an example of a 'temporary situation', I would cite the facts of the case which gave rise to the judgment in *Gemeinde Altrip and Others* (C-72/12, EU:C:2013:712, paragraph 22), which concerned an environmental impact assessment study. The authorities had begun that study under the old rules, but EU law had conferred on non-governmental organisations (NGOs) a new right to challenge that kind of study. The Court held that the new rule applied immediately to the situation concerned.

17. As another example of a 'temporary situation', I could also refer to the facts before the Court in the judgment in *Bauche and Delquignies*, 96/77, (EU:C:1978:26),[8] which concerned contracts concluded in the sugar sector under an old rule. In order to be able to export the sugar, the company needed an export licence which could be issued only under the new rule. The Court held that the new rule must be applied even though the contracts in question had been concluded under the old rule.

18. Conversely, in the case of 'existing situations' or, to use the words of the Court, 'definitively-established legal situation[s]' (judgment in *Commission* v *Freistaat Sachsen*, C-334/07 P, EU:C:2008:709, paragraph 53), the Court takes the view that 'in order to ensure observance of the principles of legal certainty and the protection of legitimate expectations, the substantive rules of Community 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, objectives or general scheme that such effect must be given to them' (judgment in *GruSa Fleisch*, C-34/92, EU:C:1993:317, paragraph 22).

19. As an example of an 'existing situation', the Commission cited, at the hearing, the registration of a trade mark. The time of the decision of a European Union body (see judgment in *Bavaria*, C-120/08, EU:C:2010:798), definitively establishes the legal situation created by that European Union act. The same applies to a decision fixing a rate of customs duties by the competent authorities, specifically in the judgment in *Molenbergnatie* (C-201/04, EU:C:2006:136), the German customs authorities.

20. As Advocate General Cosmas stated in his Opinion in *Andersson and Wåkerås-Andersson* (C-321/97, EU:C:1999:9, point 58), 'it is very important, in each case, to identify the point in time when a legal situation becomes permanently fixed, because that is the criterion for choosing the rule of law applicable. It is quite useful here to examine the temporal aspects of legal situations and in particular to draw a distinction between temporary situations and ongoing situations. In the first case, the situation arises and becomes fixed at the same time, which makes it easier to determine the rule applicable. In the second case, there is a certain interval between the point at which the situation arises and the point at which it becomes fixed. In that interval, amendments may have been made to positive law, and this may lead to an incorrect choice of legal basis. In any event, what matters, as I stated earlier, is to identify the rule in force at the time when the legal situation becomes fixed'.

7 — Judgment in *Westzucker*, 1/73, EU:C:1973:78. The Court reached its findings in the case not withstanding that Advocate General Roemer had considered in his Opinion in that case that 'no general legal principle can be discerned therein and that provisions under public law that change legislation can in principle be applied directly to as yet developing situations, even in the absence of an appropriate express provision to this effect' (see his Opinion in *Westzucker* 1/73, EU:C:1973:61, p. 737). See also judgments in *Singer*, '*Hessische Knappschaft*' (44/65, EU:C:1965:122, p. 971) and *Licata* v *CES* (270/84, EU:C:1986:304, paragraph 31).

8 — See also judgments in *Duchon* (C-290/00, EU:C:2002:234, paragraph 21 et seq.) and *Balazs* (C-401/13 and C-432/13, EU:C:2015:26, paragraph 30 et seq.).

b) Application to State aid

21. The last sentence of Article 88(3) EC (now the last sentence of Article 108(3) TFEU) 'is based on the preservative purpose of ensuring that an incompatible aid will never be implemented. That purpose is achieved first, provisionally, by means of the prohibition which it lays down, and, later, definitively, by means of the Commission's final decision, which, if negative, precludes for the future the implementation of the notified aid plan' (judgment in *CELF and Ministre de la Culture et de la Communication*, C-199/06, EU:C:2008:79, paragraph 47). Therefore, according to paragraph 48 of the same judgment, '[t]he intention of the prohibition thus effected is … that compatible aid may alone be implemented. In order to achieve that purpose, the implementation of planned aid is to be deferred until the doubt as to its compatibility is resolved by the Commission's final decision'.

22. Similarly, because of the prohibition on implementation laid down in the third sentence of Article 108(3) TFEU, where national aid measures infringe that prohibition the legal consequence is that they are unlawful (see, inter alia, judgment in *Residex Capital IV*, C-275/10, EU:C:2011:814, paragraph 28).

23. Moreover, '[a] Commission decision finding aid that was not notified compatible with the common market does not have the effect of regularising ex post facto implementing measures which were invalid because they were taken in disregard of the prohibition laid down by the last sentence of Article 88(3) EC, since otherwise the direct effect of that provision would be impaired and the interests of individuals, which are to be protected by national courts, would be disregarded. Any other interpretation would have the effect of according a favourable outcome to the non-observance of that provision by the Member State concerned and would deprive it of its effectiveness' and 'if, for any particular aid plan, whether compatible with the common market or not, failure to comply with Article 88(3) EC carried no greater risk or penalty than compliance, the incentive for Member States to notify and await a decision on compatibility would be greatly diminished — as would, consequently, the scope of the Commission's control' (judgment in *Transalpine Ölleitung in Österreich*, C-368/04, EU:C:2006:644, paragraphs 41 and 42 and the case-law cited).

24. As the Commission observed, if, even when complying with the rules and duly notifying its plans for granting aid, a Member State cannot expect to establish the framework within which its plans will be assessed, how could it achieve such an outcome by disregarding those rules and giving effect to the aid before notifying it to the Commission for the purpose of its prior authorisation? According to an established and logical principle of the review of State aid, 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 which fulfils its obligations. [9]

25. Moreover, although national courts do not have jurisdiction to rule on the compatibility of aid measures with the internal market under Article 107(2) and (3) TFEU, since that final assessment falls within the exclusive competence of the Commission (see, inter alia, judgment in *Residex Capital IV*, C-275/10, EU:C:2011:814, paragraph 27), the same does not apply to the prohibition on implementation laid down in the third sentence of Article 108(3) TFEU. That prohibition is applicable immediately (judgment in *Transalpine Ölleitung in Österreich*, C-368/04, EU:C:2006:644, paragraph 41). Accordingly, the national court is required, for example, to order the beneficiaries of aid to reimburse unlawful aid (judgment in *Residex Capital IV*, C-275/10, EU:C:2011:814, paragraphs 33 to 36). The prohibition on implementation can therefore have negative consequences for an individual, even though the Court has sometimes stated in its case-law that national courts must offer to individuals the 'certain' prospect that all appropriate conclusions will be drawn from an infringement of the prohibition on implementation. [10]

9 — See, inter alia, judgments in *France* v *Commission* (C-301/87, EU:C:1990:67, paragraph 11), and *Regione autonoma della Sardegna and Others* v *Commission* (T-394/08, T-408/08, T-453/08 and T-454/08, EU:T:2011:493, paragraph 91).

10 — See, inter alia, judgment in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598, paragraph 27).

26. However, national courts must comply generally and fully with the prohibition on implementation (judgment in *Residex Capital IV*, C-275/10, EU:C:2011:814, paragraph 29) and, in doing so, must take fully into consideration the interests of the European Union (judgment in *Transalpine Ölleitung in Österreich*, C-368/04, EU:C:2006:644, paragraph 48). Accordingly, the national court must not only ensure the protection of individual rights but also do everything in its power to give effect to the prohibition on implementation laid down in the third sentence of Article 108(3) TFEU.[11] It might also be necessary to rely on the prohibition on implementation against any request seeking to extend recourse to non-notified aid, in order to prevent the circle of recipients of unlawful aid from being extended (see, to that effect, judgment in *Transalpine Ölleitung in Österreich*, C-368/04, EU:C:2006:644, paragraph 49).

27. Indeed, 'the notification of State aid is a central element of Community rules for supervising that aid and … undertakings to which such aid has been granted may not entertain a legitimate expectation that the aid is lawful if it has not been granted in compliance with that procedure' (judgment in *Commission* v *Salzgitter*, C-408/04 P, EU:C:2008:236, paragraph 104 and the case-law cited).

28. In conclusion, while it is true that, according to the case-law,[12] limits on the immediate application of substantive rules are intended to safeguard the principles of legal certainty and protection of legitimate expectations, those limits cannot apply to unlawful aid (or notified aid before it has been authorised by the Commission). In the system and logic underlying the control of State aid, the situation is manifestly not defined immediately and definitively by the notification or grant of aid, but remains open-ended pending the decision of the EU institutions.

29. Unlawful aid cannot be regarded as definitively existing and, consequently, it constitutes not an existing situation, but a temporary situation, since the Commission is the sole body competent to decide on the lawfulness or unlawfulness of the national measure in question, which could not, therefore, create a 'definitively-established legal situation' before the Commission's decision.[13]

30. The Court's case-law on notified aid confirms that conclusion.

31. In paragraphs 51 and 52 of the judgment in *Commission* v *Freistaat Sachsen* (C-334/07 P, EU:C:2008:709), the Court ruled that the Commission can apply a new rule to all pending notifications of State aid, including in cases where the notification preceded the publication of that new rule. The Court considered that the rules, the principles and the 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 notification of planned aid is only a procedural obligation which *cannot have the effect of setting the legal framework applicable to the aid* notified. Consequently, the Court ruled that *the notification by a Member State of aid does not give rise to a definitively existing legal situation*. In that context, it should be noted that, in the present case, and in a similar manner in my view, the rules applied by the Commission (Regulation No 1370/2007) may 'be regarded as better adapted to the context of competition' and, moreover, the fact that a Member State decides to grant unlawful aid (without notifying it) 'cannot have the effect of setting the legal framework applicable to the aid notified'. It cannot be ruled out that aid paid even a decade ago might still affect competition now. This would be

11 — See Opinion of Advocate General Kokott in *Presidente del Consiglio dei Ministri* (C-169/08, EU:C:2009:420, points 119 to 122).

12 — See, in particular, judgments in *CNTA* v *Commission* (74/74, EU:C:1975:59, paragraphs 33 to 43); *Meridionale Industria Salumi and Others* (212/80 to 217/80, EU:C:1981:270); *Sofrimport* v *Commission* (C-152/88, EU:C:1992:21, paragraphs 16 and 17); and *Driessen and Others* (C-13/92 to C-16/92, EU:C:1993:828, paragraphs 30 to 35).

13 — Or before the decision of the European Union courts if they are requested to review the Commission's decision. Compliance with the procedure laid down by the Treaty should be the decisive factor in deciding whether a situation has been definitively established (existing situation) or is still open-ended and subject to changes in legislation (temporary situation). See Di Bucci, V., and Stobiecka, A., 'The Temporal Application of the State Aid Rules' in *EC State Aid Law — Le droit des aides d'État dans la CE — Liber Amicorum Francisco Santaolalla Gadea*, Alphen an den Rijn, Kluwer Law International, 2008, p. 319. See also p. 318: 'even a national principle of *res judicata* cannot prevent the recovery of State aid granted in breach of Community law' (see judgment in *Lucchini*, C-119/05, EU:C:2007:434).

the case, for example, with periodical operating aid (as in the present case), since such aid can lead to the permanent disappearance of a competitor from the market. Such persistent effects on competition are, as a rule, better dealt with by the legislation in force at the time when the Commission takes its decision.

32. Next, in paragraph 53 of that judgment, the Court ruled that '[c]onsequently, the notification by a Member State of aid or a proposed aid scheme *does not give rise to a definitively-established legal situation* which requires the Commission to rule on their compatibility with the common market by applying the rules in force at the date on which that notification took place. On the contrary, it is for the Commission to apply the rules in force at the time when it gives its decision, the only rules on the basis of which the lawfulness of the decision it takes in that regard falls to be assessed' (emphasis added). Once more, I consider that, in the present case too, the Commission should apply the rules in force at the time of its decision (Regulation No 1370/2007, not Regulation No 1191/69).

33. Finally, in paragraph 54 of the judgment in *Commission v Freistaat Sachsen* (C-334/07 P, EU:C:2008:709), the Court held that '[c]ontrary to the submission of the Freistaat Sachsen, this approach is not such as to encourage Member States to implement planned aid immediately without giving notification, in order to avail themselves of the legal rules in force at the time of that implementation. *Even if the compatibility of unlawful aid with the common market is to be assessed in any event at the date when it was paid, Member States cannot easily anticipate the details of changes to the rules*. Furthermore, the grant of unlawful aid may lead to the Member State which paid it having to recover it and also make reparation for damage caused by reason of the unlawful nature of that aid' (emphasis added). The Court therefore left open the question whether unlawful aid must be assessed in accordance with the rules in force at the date when it was paid, as the case in question concerned the temporal application of the rules to notified aid.

34. That said, I consider that the Court's arguments for assessing notified aid in accordance with the rules applicable at the time of the Commission's decision and not at the time of the notification apply *a fortiori* to non-notified (unlawful) aid. As the Court states in paragraph 45 of the same judgment, '[t]he notification of proposed State aid, provided for in Article 88(3) EC, is a central element of Community rules for supervising that aid and undertakings to which such aid has been granted may not entertain a legitimate expectation that the aid is lawful if it has not been granted in compliance with that procedure'. Therefore, the Commission's assessment of the lawfulness of aid constitutes the determination of the present legal consequences of actions in the past, namely the granting of the aid without prior notification. [14]

35. Moreover, it is not only the Commission (which decided that Regulation No 1370/2007 was the appropriate legal basis for assessing non-notified aid granted before 3 December 2009 [15]) but also the EFTA Surveillance Authority adopts this approach. [16]

14 — See Maxian Rusche, T., and Schmidt, S., 'The post-Altmark Era Has Started: 15 Months of Application of Regulation (EC) No. 1370/2007 to Public Transport Services', *European State Aid Law Quarterly*, 2/2011, p. 262.

15 — See the decision at issue but also Commission Decision 2011/501/EU of 23 February 2011 on State aid C 58/06 (ex NN 98/05) implemented by Germany for Bahnen der Stadt Monheim (BSM) and Rheinische Bahngesellschaft (RBG) in the Verkehrsverbund Rhein-Ruhr (OJ 2011 L 201, p. 1).

16 — EFTA Surveillance Authority Decision 254/10/COL of 21 June 2010 on AS Oslo, AS Oslo Sporveier and AS Sporveisbussene. That decision was challenged on a different point in Case E-14/10, *Konkurrenten.no* v *EFTA Surveillance Authority*. According to Maxian Rusche, T., and Schmidt, S., op. cit., p. 262, there were at the time three other investigations opened by the Commission which were pending and had been opened on the basis of Regulation No 1191/69 but were to be decided on the basis of Regulation No 1370/2007, namely: the decision of 28 November 2007 in *Germany — Emsland*, C 54/2007; the decision in State aid — Germany — State aid C 47/07 (ex NN 22/05) — Public service contract between Deutsche Bahn Regio and the *Länder* of Berlin and Brandenburg — Invitation to submit comments pursuant to Article 88(2) of the EC Treaty (OJ 2008 C 35, p. 13) and the decision of 16 April 2008, Czech Republic — C 17/2008, *Usti nad Labem*.

c) Classification of the aid measure in question

36. The parties agree that, in the case of aid which has been notified but not yet paid (planned aid), the only law applicable to the review to be conducted by the Commission is the law in force at the time when the Commission takes its decision. This matter was definitively resolved by the judgment in *Commission* v *Freistaat Sachsen* (C-334/07 P, EU:C:2008:709, paragraphs 50 to 52).

37. It is common ground in the present case that the measures in question are State aid and that the Danish Government paid that aid to DSB without notifying the Commission. However, the Danish Government and DSB insist that those payments are lawful, since the measures at issue were, in their view, consistent with Article 14 of Regulation No 1191/69 and were therefore exempt, under Article 17(2) of that regulation, from the obligation to notify.

38. It is true that the Commission did not expressly adopt a position in its decision on the lawfulness of those payments of non-notified aid (nor, moreover, was a position adopted in the judgment under appeal).

39. In response to a question put to it by the Court at the hearing, the Commission explained that if, as DSB claims, the aid fulfilled the conditions for the block exemption under the former Regulation No 1191/69, it would not have been competent to adopt the decision at issue. Therefore, by adopting the decision at issue, the Commission had *implicitly* considered that the aid was unlawful. It had not expressly classified it as 'unlawful' at the request of the Danish Government, which, as it confirmed at the hearing, wanted to avoid any interest being paid by the Danish railways on the basis of the case-law in *CELF and Ministre de la Culture et de la Communication* (C-199/06, EU:C:2008:79).

40. That being the case, according to the Commission, the Danish Government, which could have complained of incompetence on the part of the Commission, did not do so. More convincingly in my view, the Commission points out that the Danish Government gave the Commission an undertaking that it would correct the overcompensation, without which the Commission would not have authorised the aid in question. In other words, the Danish Government could not give that undertaking without admitting that the aid was not the subject of a block exemption.

d) The judgment under appeal

41. I note, first of all, that, given the importance and complexity of the subject, the judgment under appeal is expressed in very brief terms (the analysis is confined to paragraphs 34 to 58), is based in respect of the decisive matter on only two judgments of the General Court,[17] which, moreover, have been called into question by the case-law of the Court of Justice,[18] and does not explain how a Member State, by infringing Article 108(3) TFEU, would create a definitively-established legal situation in EU law.

42. In the judgment under appeal (paragraph 40), the General Court, relying on the judgment in *SIDE* v *Commission* (T-348/04, EU:T:2008:109), holds that 'as regards aid which has been paid without being notified, the applicable substantive rules are those in force at the time when the aid was paid, since the advantages created by such aid arose during the period in which that aid was paid'. I would make the following comments on that passage of the judgment.

17 — Namely, the judgments in *SIDE* v *Commission* (T-348/04, EU:T:2008:109), and *Italy* v *Commission* (T-3/09, EU:T:2011:27). See paragraphs 40 and 43 of the judgment under appeal.

18 — See, in particular, judgments in *Commission* v *Freistaat Sachsen* (C-334/07 P, EU:C:2008:709); *Diputación Foral de Vizcaya and Others* v *Commission* (C-465/09 P to C-470/09 P, EU:C:2011:372), and order in *Cantiere navale De Poli* v *Commission* (C-167/11 P, EU:C:2012:164). In that regard, see point 47 et seq. of this Opinion.

43. First, the question is not when the advantages arose but when they may be regarded as definitively and legally established in EU law, which, in my view, can occur only from the time when the Commission takes a decision on those effects.

44. Secondly, contrary to what the General Court states, a competitor may ask the national court at any time to remove those advantages if no notification has taken place. Incidentally, Mr Andersen could have availed himself of that remedy rather than complaining of a 'retroactive' application of Regulation No 1370/2007 and of the fact that the Commission had taken too long to adopt the decision at issue. The court would have ordered the recovery of the aid and, at the time, would have applied Regulation No 1191/69 regarding the question whether the block exemption was applicable.

45. Thirdly, the idea that the compatibility or incompatibility of aid with EU law is definitively established when the aid is granted and produces its effects is erroneous. Although distortion of competition is inherent in the concept of aid, which is an objective concept (judgments in *Ladbroke Racing* v *Commission*, T-67/94, EU:T:1998:7, paragraph 52, and *SIC* v *Commission*, T-46/97, EU:T:2000:123, paragraph 83), the fact remains that 'the assessment of the compatibility of aid measures or of an aid scheme with the common market falls within the exclusive competence of the Commission, subject to review by the Court', since the case-law attributes to the Commission a wide discretion for this purpose (judgment in *Unicredito Italiano*, C-148/04, EU:C:2005:774, paragraphs 42 and 71). As the compatibility of aid with EU law is established only by the Commission's decision, subject to review by the European Union judicature, the situation is still ongoing at the time when the Commission takes its decision and any change occurring in the legal environment before that decision will have to be taken into account.[19]

46. Fourthly, it is not correct to state that the advantages and disadvantages resulting from the grant of unlawful aid arose during the period in which the aid in question was paid. 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 the aid is recovered. Even if the advantage is not directly reflected in the undertaking's balance sheet years after aid is granted, it none the less permanently strengthens the competitive position of the recipient as compared to other undertakings which have not received any aid [and] [i]t is not the Commission's task to cast its mind back to the time when the aid was granted and to assess only its effect at that time. The Commission must rather protect current competition by measuring the (continuing) effect of the aid against the yardstick that applies when the decision is adopted'.

47. In any event, I consider (like the Commission) that the arguments on which the judgment in *SIDE* v *Commission* (T-348/04, EU:T:2008:109) and the judgment under appeal are based were categorically rejected by the Court 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), in which the Court stated in paragraphs 125 and 128, first, that the application of new rules to unlawful aid does not cover a previously existing situation, but an ongoing situation, next, that the effective application of competition policy requires that the Commission can adapt its assessment to the needs of that policy at any time and, finally, 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.

48. This means that the Commission is entitled to apply new compatibility rules when it assesses aid which has been paid but not notified. Whereas the case in question concerned the lawfulness of transitional rules laid down in guidelines adopted by the Commission, the Court cited in support of its reasoning the judgment in *Pokrzeptowicz-Meyer* (C-162/00, EU:C:2002:57), which concerned

19 — See Di Bucci, V., and Stobiecka, A., op. cit., p. 326.

legislative provisions, a matter which, in my view, invalidates the General Court's attempt in paragraph 55 of the judgment under appeal to distinguish the judgment in *Diputación Foral de Vizcaya and Others* v *Commission* (C-465/09 P to C-470/09 P, EU:C:2011:372), because it concerned only the applicability of guidelines.

49. The same arguments apply *mutatis mutandis* to the other judgment on which the General Court relies in paragraph 40 of the judgment under appeal, namely the judgment in *Italy* v *Commission* (T-3/09, EU:T:2011:27). [20] That second judgment, which, moreover, was concerned with notified aid, fails, like the judgment in *SIDE* v *Commission* (T-348/04, EU:T:2008:109), to take into account a decisive factor, highlighted by the Court of Justice in the judgments in *Commission* v *Freistaat Sachsen* (C-334/07 P, EU:C:2008:709) and *Diputación Foral de Vizcaya and Others* v *Commission* (C-465/09 P to C-470/09 P, EU:C:2011:372), whether or not the aid has been notified, namely that the situation linked to that aid cannot be regarded as definitive until the Commission has taken its decision on its compatibility with the internal market — and even until that decision has become final (see judgment in *Spain* v *Commission*, C-169/95, EU:C:1997:10, paragraph 53).

50. As to Mr Andersen's argument that he is entitled to legal certainty and therefore to know which law applies to the aid that his competitor has received, it is sufficient to point out that, according to the Court's case-law, there is no protection from a change in the rules and therefore from new rules applying to situations which persist (see the case-law cited in point 15 of this Opinion).

e) Conclusion

51. In summary, the situation linked to an aid, whether notified or not, cannot be regarded as definitive until the Commission's decision on the compatibility of the aid has become final.

52. First of all, recovery can be ordered until that time either by the Commission or by the national court.

53. 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 which fulfils those obligations. 'A breach of the standstill obligation may not lead to a better position with respect to cases that were notified to the Commission in a legally compliant manner'. [21]

54. Finally, it is clear that there is also 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.

55. It follows that the General Court erred in law by upholding Mr Andersen's third plea and ruling that the compatibility of non-notified aid with the internal market must be assessed in the light of the rules in force at the time when it was granted and that the judgment under appeal must be set aside. Accordingly, the Court of Justice should itself reject as unfounded the third plea relied on at first instance.

56. The Court of Justice cannot rule on the first and second pleas relied on at first instance (see paragraphs 20 and 21 of the judgment under appeal), in particular, because their examination requires verification of the merits of complex economic assessments carried out by the Commission, which is a matter for the General Court.

20 — It should be noted, for the purposes of this appeal, that that judgment is identical in substance to the judgment in *Cantiere navale De Poli* v *Commission* (T-584/08, EU:T:2011:26). Those two judgments were the subject of an appeal which gave rise to the orders in *Cantiere navale De Poli* v *Commission* (C-167/11 P, EU:C:2012:164) and *Italy* v *Commission* (C-200/11 P, EU:C:2012:165).

21 — See Lipinsky, J., op. cit.

B – *The cross-appeals of DSB and of the Kingdom of Denmark*

57. These two cross-appeals raise, in essence, the same question and overlap to such an extent that it is appropriate to examine them together.

1. Summary of the arguments of the parties

58. DSB relies on a single ground of appeal, namely that the potentially incorrect application by the Commission of Regulation No 1370/2007 should have no effect on the validity of the decision at issue, since the application of Regulation No 1191/69 would not have led the Commission to a different conclusion concerning the compatibility of the aid in question.

59. The Danish Government, for its part, considers 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. Its line of argument is identical in substance to that of DSB.

60. On the basis of a combined reading of the decision at issue and the initiating decision, DSB asserts 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).

61. DSB further submits that the General Court was required to decide whether the Commission's interpretation of Regulation No 1191/69 and the conclusions drawn from that interpretation were correct. In that regard, DSB points out that, according to settled case-law, an error of law does not justify the annulment of the decision at issue where, if the error had not been committed, the Commission would have adopted the same decision (see, in particular, judgment in *Falck and Acciaierie di Bolzano* v *Commission*, C-74/00 P et C-75/00 P, EU:C:2002:524, paragraph 122).

62. The Danish Government, for its part, argues that the General Court infringed EU law by rejecting, in paragraph 58 of the judgment under appeal, its arguments aimed at demonstrating that the application of Regulation No 1370/2007 was a procedural irregularity which was not such as to affect the substance of the decision at issue.

63. Finally, the Danish Government considers that the state of the proceedings permits the Court of Justice to give final judgment, as the Court is in a position to rule that the decision at issue could not be annulled owing to the fact that the Commission based it on Regulation No 1370/2007, since the conditions to which compensation in respect of public transport contracts is subject under Regulation No 1191/69 are identical to or less strict than the conditions laid down by Regulation No 1370/2007.

64. The Commission supports, in essence, DSB's arguments, except for that outlined in point 61 of this Opinion, as it considers that the decision at issue contains an analysis of the aid at issue in the light of both regulations.

2. Analysis

65. The cross-appeals raise the question whether the Commission based the operative part of the decision at issue on a review of the aid at issue solely in the light of Regulation No 1370/2007 or also in the light of Regulation No 1191/69.

66. In Mr Andersen's view, the General Court's conclusion that the Commission carried out its review solely on the basis of Regulation No 1370/2007 is based on recitals 307, 314, 397 and 398 of the decision at issue and is a question of fact which cannot be the subject of assessment by the Court of Justice.

67. I cannot support that argument, as the interpretation of the decision at issue is clearly a legal question. That being so, it is clear from a reading of recitals 304, 307, 314 and 397 of that decision that the General Court correctly concluded that, in that decision, the Commission applied only Regulation No 1370/2007.

68. The General Court rightly held that recital 398 of the decision at issue (which states that the application of Regulation No 1191/69 would not have led to a different conclusion) was insufficient for a finding that the Commission had based its assessment on both regulations, in particular since the Commission's finding is not preceded by any review in the light of that regulation.

69. Moreover, the Commission itself recognises in that recital that the substantive rules of Regulation No 1191/69 are only 'similar in essence' to those of Regulation No 1370/2007.

70. As Mr Andersen pointed out, the judgments relied on by DSB cannot lead to a different result. The General Court held, in paragraph 75 of the judgment in *González y Díez* v *Commission* (T-25/04, EU:T:2007:257), that the substantive provisions in question were 'identical', which is not so in the present case. As regards the judgment in *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), it is sufficient to note that the General Court stated in paragraph 221 that the aid in question was operating aid, which could not be declared compatible in the light of Article 107(3)(c) TFEU independently from the applicable guidelines. As to the judgment in *CMA CGM and Others* v *Commission* (T-213/00, EU:T:2003:76), it did not concern State aid, but an agreement which would, in any event, have been contrary to Article 101(1) TFEU.

71. Nothing is altered by the reference to the initiating decision, as in it the Commission merely outlines the arguments of the parties and states that it 'harbours doubts' as to the merits of the arguments put forward by DSB and the Danish Government. Therefore, the case-law of the General Court relied on by DSB in point 60 of this Opinion is irrelevant.

72. In order to uphold the Commission's finding that application of Regulation No 1191/69 would not have led to a different conclusion from that drawn in the decision at issue, the General Court would have had to conduct its own assessment of the aid at issue in the light of that regulation, for which it has no jurisdiction in the context of an action for annulment.

73. It follows from all the foregoing that the cross-appeals of DSB and the Kingdom of Denmark should be dismissed.

V – **Conclusion**

74. In the light of the foregoing I propose that the Court of Justice should:

— set aside the judgment of the General Court of the European Union in *Andersen* v *Commission* (T-92/11, EU:T:2013:143);

— declare that the third plea raised at first instance is unfounded and refer the case back to the General Court of the European Union for consideration of the first and second pleas at first instance;

— dismiss the cross-appeals of Danske Statsbaner (DSB) and the Kingdom of Denmark;

— reserve the costs of the proceedings at first instance and on appeal.