Reports of Cases

JUDGMENT OF THE GENERAL COURT (First Chamber)

7 September 2022*

(State Aid – Aid granted by Belgium to JCDecaux Street Furniture Belgium – Decision declaring the aid incompatible with the internal market and ordering its recovery – Advantage – Obligation to state reasons)

In Case T-642/19,

**JCDecaux Street Furniture Belgium**, established in Brussels (Belgium), represented by A. Winckler, G. Babin and B. Cambier, lawyers,

applicant,

v

**European Commission**, represented by G. Braga da Cruz, C. Georgieva and D. Recchia, acting as Agents,

defendant,

supported by

**Clear Channel Belgium**, established in Brussels, represented by P. de Bandt, M. Gherghinaru and L. Panepinto, lawyers,

intervener,

THE GENERAL COURT (First Chamber),

composed of H. Kanninen, President, M. Jaeger and M. Stancu (Rapporteur), Judges,

Registrar: L. Ramette, Administrator,

having regard to the written part of the procedure,

further to the hearing on 2 March 2022,

gives the following

* Language of the case: French.

## Judgment

1 By its action based on Article 263 TFEU, the applicant, JCDecaux Street Furniture Belgium, formerly JCDecaux Belgium Publicité, seeks the annulment of Commission Decision C(2019) 4466 final of 24 June 2019 on State aid SA.33078 (2015/C) (ex 2015/NN) implemented by Belgium in favour of JC Decaux Belgium Publicité ('the contested decision').

### Background to the dispute

2 The City of Brussels (Belgium) and the applicant concluded two successive contracts for the provision of street furniture, some of which could be used for advertising purposes.

3 The first contract, dated 16 July 1984 ('the 1984 contract'), which had a duration of 15 years, provided that the applicant was to install in the City of Brussels bus shelter advertisements and street furniture known as '*mobiliers urbains pour l'information*' ('information street furniture') ('MUPIs') of which it would retain ownership, on the following conditions:

– the applicant would not be required to make any payment for rent, right of occupancy or fees for the bus shelters or the MUPIs, but was to offer the City of Brussels a number of benefits in kind: it was to provide, free of charge, waste-paper bins, public toilets and electronic newspapers, and to display a general map of the City of Brussels, a tourist and hotel map and a map of the pedestrianised streets in the City of Brussels;

– in return, the applicant was permitted to use the bus shelters and MUPIs it supplied for advertising;

– each display could be used for a period of 15 years running from the date of its installation, as recorded in the presence of both parties to the contract.

4 In 1995, the City of Brussels terminated the 1984 contract.

5 In 1998, the City of Brussels issued a call for tenders for the manufacture, supply, installation, commissioning and maintenance of MUPIs, passenger shelters and display panels, some of which could be used for advertising purposes.

6 In order to honour its contractual obligations under the 1984 contract and to ensure the transparency of the call for tenders, the City of Brussels listed, in Annex 10 to the special tender specifications ('Annex 10'), 282 bus shelters and 198 MUPIs covered by the 1984 contract ('the displays included in Annex 10'), in respect of which the applicant's right of use had not yet expired under the terms of the 1984 contract, indicating their locations and the expiry dates for their use.

7 The second contract, of 14 October 1999 ('the 1999 contract'), which consisted of a purchase order and the tender specifications referred to in paragraph 6 above and its annexes, including Annex 10, was signed by the applicant, which won the tender. The 1999 contract replaced the 1984 contract, and its conditions were as follows:

– the duration of the contract was 15 years;

– ownership of the street furniture installed would pass to the City of Brussels, in return for the payment of a net fixed price per display supplied, fully equipped, installed and made operational;

– the applicant was to pay monthly rent to use the street furniture covered by the contract for advertising.

8 When the 1999 contract was implemented, some of the displays listed in Annex 10 were removed before the expiry dates stipulated in that annex, while others were kept in place after those dates. For the latter, unlike in the case of the displays covered by the 1999 contract, the applicant paid neither rent nor tax to the City of Brussels. That situation lasted until August 2011, when the last displays listed in Annex 10 were dismantled.

9 On 19 April 2011, the intervener, Clear Channel Belgium, lodged a complaint with the European Commission in which it claimed that, by continuing to use certain displays listed in Annex 10 after the expiry dates stipulated for them, without paying rent or taxes to the City of Brussels, the applicant had benefited from State aid incompatible with the internal market.

10 On 24 March 2015, the Commission initiated the formal investigation procedure under Article 108 TFEU.

11 By a judgment of 29 April 2016, the cour d'appel de Bruxelles (Court of Appeal, Brussels, Belgium) upheld the judgment given on 13 December 2010 by the tribunal de première instance francophone de Bruxelles (Brussels Court of First Instance (French-speaking), Belgium), which had found that the applicant had failed to adhere to the expiry dates stipulated in Annex 10 for the use of certain displays listed in that annex, that it had not been expressly authorised by the City of Brussels to make a change in the basis ('interversion') of the advertising displays, and that it had therefore used many of those displays on public property in the City of Brussels without right or title.

12 On 24 June 2019, the Commission closed the formal investigation procedure by adopting the contested decision. Articles 1 and 2 of that decision are worded as follows:

*'Article 1*

The State aid to [the applicant], in an amount equivalent to the rent and taxes not paid on the advertising displays installed in the City of Brussels governed by the 1984 contract and kept in place after the removal date specified in annex 10 to the 1999 contract, granted by Belgium unlawfully between 15 September 2001 and 21 August 2010 in breach of Article 108(3) [TFEU], is incompatible with the internal market.

*Article 2*

1. Belgium shall recover the aid referred to in Article 1 from the beneficiary.

…'

## Forms of order sought

13 The applicant claims that the Court should:

– annul Article 1 of the contested decision, in so far as it finds that JCDecaux received State aid incompatible with the internal market in the performance of the 1984 contract, and Articles 2 and 4, in so far as they order the recovery of that aid from JCDecaux by the Kingdom of Belgium;

– order the Commission and the intervener to pay the costs.

14 The Commission contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

15 The intervener contends that the Court should dismiss the action.

## Law

16 In support of its action, the applicant raises four pleas in law. In the context of the first plea, the applicant submits that the Commission made a manifest error of assessment and an error of law in finding that the use of certain displays listed in Annex 10 after the expiry dates stipulated for them in that annex constituted an advantage. By its second to fourth pleas, all of which are raised in the alternative, the applicant submits that the hypothetical State aid was compatible with the internal market pursuant to the Communication from the Commission on the European Union framework for State aid in the form of public service compensation (OJ 2012 C 8, p. 15) and Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) TFEU to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ 2012 L 7, p. 3) (second plea), that the Commission infringed its obligation to state reasons as regards the assessment of the amount to be recovered (third plea), and that the State aid found by the contested decision was in any event time-barred (fourth plea).

### *The first plea, alleging that the Commission made a manifest error of assessment and an error of law in finding that the use by the applicant of certain displays listed in Annex 10 after the expiry date stipulated in that annex constituted an advantage*

17 By its first plea, which is divided into three parts, the applicant seeks, in essence, to call into question the analysis carried out by the Commission in recitals 82 to 96 of the contested decision, concerning the concept of 'economic advantage' for the purposes of Article 107(1) TFEU. By the first part, the applicant submits that the Commission wrongly disregarded the compensation mechanism applied by the City of Brussels in order to maintain the economic balance of the 1984 contract ('the compensation mechanism established by the 1984 contract'). By the second part, the applicant submits that the Commission's counterfactual scenario, in which rent and taxes should have been collected for the displays listed in Annex 10 which were kept in place after the expiry dates stipulated in that annex, was incorrect. By the third part, the

applicant submits that the Commission wrongly stated that the 1984 contract was 'purely commercial' and thus refused to apply the tests established by the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415).

*The first part, alleging that the Commission wrongly disregarded the compensation mechanism established by the 1984 contract*

18 In the context of the first part of the first plea, the applicant submits that, first, by ruling out the relevance of the compensation mechanism established by the 1984 contract, the Commission disregarded the practical and legal realities of long-term public utility facilities contracts in Belgium; secondly, that compensation mechanism, based on the City of Brussels' obligation to maintain the economic balance of the 1984 contract, necessarily precludes an advantage being granted to it; thirdly, the Commission made an error of law in referring to the judgment of 26 October 2016, *Orange* v *Commission* (C-211/15 P, EU:C:2016:798), and to the case-law established by the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415), without taking into account the compensation mechanism established by the 1984 contract; fourthly, in ruling out the relevance of that mechanism because it agreed 'on its own initiative' to remove a number of displays listed in Annex 10 at the request of the City of Brussels, the Commission disregarded the objective nature of the concept of 'State aid'; and, fifthly, the absence of additional documentation accompanying the compensation mechanism established by the 1984 contract does not permit the inference that the City of Brussels did not act as a market operator would have done, nor does it demonstrate the existence of an advantage, since such an absence is customary in the type of contract at issue and there was no requirement laid down either in law or in the contract for the compensation mechanism established by the 1984 contract to be formalised in writing.

19 The Commission and the intervener dispute the applicant's arguments.

20 According to the settled case-law of the Court of Justice, classification as 'State aid' within the meaning of Article 107(1) TFEU requires four conditions to be satisfied, namely that there be intervention by the State or through State resources, that the intervention be liable to affect trade between Member States, that it confer a selective advantage on the beneficiary, and that it distort or threaten to distort competition. Furthermore, that advantage must be attributable to the State (see judgment of 25 January 2022, *Commission* v *European Food and Others*, C-638/19 P, EU:C:2022:50, paragraph 121 and the case-law cited).

21 It is apparent from settled case-law that the concept of 'aid' embraces not only positive benefits, such as subsidies, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect (see judgment of 11 September 2014, *Greece* v *Commission*, T-425/11, EU:T:2014:768, paragraph 39 and the case-law cited).

22 Accordingly, it has been held that a measure by which the public authorities grant to certain undertakings an exemption from economic charges which, although not involving a transfer of State resources, places the beneficiaries in a more favourable financial situation than other taxpayers, constitutes State aid within the meaning of Article 107(1) TFEU (see, by analogy, judgment of 11 September 2014, *Greece* v *Commission*, T-425/11, EU:T:2014:768, paragraph 40 and the case-law cited).

23 For the purposes of Article 107(1) TFEU, advantage means an economic advantage which the undertaking in question would not have obtained under normal market conditions, that is to say, in the absence of State intervention (see, to that effect, judgment of 29 April 1999, *Spain* v *Commission*, C-342/96, EU:C:1999:210, paragraph 41).

24 Moreover, the concept of 'advantage', which is intrinsic to the classification of a measure as State aid, is an objective one, irrespective of the motives of the persons responsible for the measure in question. Accordingly, the nature of the objectives pursued by State measures and their grounds of justification have no bearing whatsoever on whether such measures are to be classified as State aid. Article 107(1) TFEU does not distinguish between the causes or the objectives of State aid measures, but defines them in relation to their effects (see judgment of 25 January 2022, *Commission* v *European Food and Others*, C-638/19 P, EU:C:2022:50, paragraph 122 and the case-law cited).

25 As regards the compensation mechanism established by the 1984 contract, in the first place, the fact that the retention and use of certain displays listed in Annex 10 after the expiry dates stipulated in that annex was intended to compensate for an alleged disadvantage suffered by the applicant as a result of the early removal of a number of displays listed in Annex 10, allegedly imposed by the City of Brussels, and that that compensation mechanism was in line with the practical and legal realities of long term public utility facilities contracts in Belgium, does not imply that that mechanism cannot constitute State aid.

26 Indeed, as is clear from the case-law cited in paragraph 24 above, the concept of 'State aid' is an objective legal concept defined directly by Article 107(1) TFEU, which does not distinguish between the causes or the objectives of State aid measures, but defines them in relation to their effects. Consequently, the fact that the objective of the State measure was to maintain the economic balance of the 1984 contract, or that that objective was consistent with the principles of national law cannot rule out *ab initio* the classification of such a measure as 'State aid'.

27 The same applies to the applicant's argument that, by ruling out the relevance of the compensation mechanism established by the 1984 contract because the applicant had agreed 'on its own initiative' to remove a number of displays listed in Annex 10 at the request of the City of Brussels, the Commission disregarded the objective nature of the concept of 'State aid'.

28 In the second place, contrary to what the applicant submits, the fact that the applicant continued to use certain displays listed in Annex 10 after the expiry dates stipulated in that annex, without paying rent or taxes to the City of Brussels, had the effect of mitigating those charges which would have been included in its budget.

29 It is common ground between the parties that, after the conclusion of the 1999 contract, the applicant could install and use street furniture in the territory of the City of Brussels only under the conditions laid down in that contract, according to which it had to pay rent and taxes. According to Annex 10, by derogation from the terms of the 1999 contract, the applicant could continue to use the displays listed in that annex under the conditions laid down in the 1984 contract, namely without paying any rent or tax, but only until the expiry dates stipulated in that annex. After those dates, the displays in question were to be replaced by new displays covered by the 1999 contract, and would therefore be subject to the obligation to pay taxes and rent.

30 It follows that the fact that the applicant continued to use certain displays listed in Annex 10 under the conditions laid down by the 1984 contract after the expiry dates stipulated in that annex enabled it to avoid installing and using new displays covered by the 1999 contract and, consequently, to avoid paying the rent and taxes which it should have paid under that contract. Furthermore, it is clear from recital 49 of the contested decision that the use of certain displays listed in Annex 10 could not continue after the expiry dates stipulated in that annex without the permission of the City of Brussels.

31 Indeed, in that regard, it must be noted, as stated in paragraph 11 above, that by its judgment of 29 April 2016, the cour d'appel de Bruxelles (Court of Appeal, Brussels) found that the applicant had failed to adhere to the expiry dates stipulated in Annex 10 for the use of certain displays listed in that annex, that it had not been expressly authorised by the City of Brussels to make a change in the basis ('interversion') of the advertising displays, and that it had therefore used many of those displays on public property in the City of Brussels without right or title.

32 It is true that the applicant claims that the judgment of 29 April 2016 of the cour d'appel de Bruxelles (Court of Appeal, Brussels) cannot be taken into account in the present proceedings in so far as the City of Brussels was not a party in that case and was therefore unable to confirm before the national court the existence of the compensation mechanism established by the 1984 contract.

33 However, that argument cannot succeed. Indeed, as the Commission rightly states, without being contradicted by the applicant, it is clear from a reading of the judgment of 29 April 2016 of the cour d'appel de Bruxelles (Court of Appeal, Brussels) that the City of Brussels was joined as a party to the proceedings and given the opportunity to submit its observations. Moreover, as stated in the contested decision, in the pre-litigation procedure, the City of Brussels did not challenge that judgment.

34 In the third place, the applicant is wrong to argue that the Commission could not rely, in recitals 87 to 89 of the contested decision, on paragraphs 41 to 44 of the judgment of 26 February 2015, *Orange* v *Commission* (T-385/12, not published, EU:T:2015:117), on the ground that the findings of the General Court therein were specific to the facts of the dispute.

35 In paragraph 43 of the judgment of 26 February 2015 *Orange* v *Commission* (T-385/12, not published, EU:T:2015:117), it was held that it was only in so far as State intervention had to be regarded as compensation for the services provided by undertakings responsible for a service of general economic interest in order to discharge public service obligations, in accordance with the criteria set out in the case-law established by the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415), that that intervention was not caught by Article 107(1) TFEU. Thus, the General Court did not intend to limit the scope of that finding to the case at issue in that judgment. Furthermore, the argument that, in the present case, account should be taken of a contractual arrangement has no factual basis, since, as stated in paragraph 31 above, by the judgment of 29 April 2016, the cour d'appel de Bruxelles (Court of Appeal, Brussels) found that the applicant had not been expressly authorised by the City of Brussels to make a change in the basis ('interversion') of the advertising displays.

36 That conclusion cannot be called into question by the applicant's argument that the comparison with the case-law established by the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415), is ineffective since it was not liable to pay taxes and rent and there could not be a transfer of State resources. In recitals 87 to 89 of

the contested decision, the Commission referred to the case-law established by the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415), in relation to the establishment of an advantage and not to examine a transfer of State resources. Moreover, in the third part of the first plea, the applicant itself relies on that case-law, maintaining that the conditions laid down therein are applicable in the present case.

37 In the fourth place, as regards the applicant's challenging of the Commission's conclusion, in recitals 94 and 95 of the contested decision, that the compensation mechanism established by the 1984 contract could not be deemed normal conduct of a market economy operator, it should be noted, even if the conduct of the City of Brussels in this case could be examined, that according to the case-law, in order to ascertain whether a State measure constitutes aid, it is necessary to determine whether, in similar circumstances, a market economy operator of a size comparable to that of the bodies managing the public sector might have been prompted to adopt a similar decision, namely, in this case, to provide similar compensation for damage allegedly caused to a co-contractor in the performance of its contractual obligations (see, to that effect, judgment of 13 December 2018, *Ryanair and Airport Marketing Services* v *Commission*, T-165/15, EU:T:2018:953, paragraph 140). Furthermore, there must be objective and verifiable evidence showing clearly that, before or at the same time as conferring the economic advantage, the Member State concerned took the decision to compensate, by means of the measure actually implemented, for damage allegedly caused to a co-contractor in the performance of its contractual obligations (see, to that effect, judgment of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraphs 82 and 83).

38 In that regard, it should be noted first of all that the Commission was not presented with any evidence of an evaluation by the City of Brussels of the actual loss incurred by the applicant as a result of the early removal of certain displays listed in Annex 10, which the compensation mechanism established in the 1984 contract was intended to offset, or an evaluation of the profit that could be earned from keeping in place other displays listed in that annex.

39 Secondly, there is no evidence in the file that the city of Brussels monitored the implementation of the compensation mechanism established by the 1984 contract. In that respect, however, during the investigation procedure before the Commission, the Belgian authorities stated that there had been an imbalance between the number of displays listed in Annex 10 removed early, and the number kept in place after the expiry dates stipulated in that annex, and that the alleged compensation granted under the compensation mechanism established by the 1984 contract had gone beyond what was required by the alleged disadvantage suffered by the applicant (see recitals 85 and 89 of the contested decision).

40 Thirdly, as regards the applicant's argument that the absence of additional documentation accompanying the compensation mechanism established by the 1984 contract does not permit the inference that the City of Brussels did not act as a market operator would have done, nor does it demonstrate the existence of an advantage, since such an absence is customary in the type of contract at issue and there is no requirement laid down either in law or in the contract for the compensation mechanism established by the 1984 contract to be formalised in writing, it is sufficient to note that, as stated in paragraph 31, by its judgment of 29 April 2016, the cour d'appel de Bruxelles (Court of Appeal, Brussels) found that the applicant had failed to adhere to the expiry dates stipulated in Annex 10 for the use of certain displays listed in that annex, that it had not been expressly authorised by the City of Brussels to make a change in the basis ('interversion') of the advertising displays, and that it had therefore used many of those displays on public property in the City of Brussels without right or title.

41 In addition, and in any event, it must be held, as the Commission rightly states, that irrespective of whether or not there was a requirement, under Belgian law or under the 1984 contract, for the compensation mechanism established by that contract to be formalised in writing, that compensation mechanism did not exempt the national administration from carrying out an assessment, before putting that mechanism in place, of the existence and extent of any loss which may have been incurred by the applicant as a result of the early removal of certain displays listed in Annex 10, and which that mechanism was intended to compensate for in order to maintain the economic balance of the 1984 contract. Indeed, such an assessment was necessary in order to verify whether the measure granted by the national administration complied with the requirements of European Union law, in particular those arising from Article 107(1) TFEU.

42 In the light of all the foregoing, the Commission was right to consider that the retention and use by the applicant of a number of displays listed in Annex 10 after the expiry dates stipulated in that annex constituted an economic advantage for the purposes of Article 107(1) TFEU, even if the retention of those displays was a compensation mechanism established by the 1984 contract.

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

*The second part, alleging that the Commission made a manifest error of assessment and an error of law in finding that the applicant had saved on rent and taxes, which constituted an advantage*

44 By this part, the applicant challenges, in essence, recital 132 of the contested decision, in which the Commission considered that the amount of the incompatible aid should be calculated for each display listed in Annex 10 and kept in place after the expiry date stipulated in that annex (after 15 September 2001), taking as a reference the rent due under the 1999 contract and the taxes generally applicable to advertising displays between the expiry date stipulated in Annex 10 (if that date was after 15 September 2001) or 15 September 2001 (if that date was before 15 September 2001) and the date on which the removal actually took place. In respect of the latter, the Commission stated that the amount should be calculated on the basis of Articles 3 to 5 of the tax regulation of the City of Brussels of 17 October 2001, Articles 4 to 7 of the tax regulation of the City of Brussels of 18 December 2006 and Articles 4 to 6 of the tax regulations of the City of Brussels of 17 December 2007, 15 December 2008, 9 November 2009, 20 December 2010 and 5 December 2011.

– *The complaint concerning the rent not charged*

45 As regards the rent not charged, the applicant submits that, since the compensation mechanism established in the 1984 contract was introduced by the City of Brussels in order to maintain the economic balance of that contract, the displays listed in Annex 10 and kept in place after the expiry dates stipulated in that annex were covered by the conditions laid down by that contract. Since the 1984 contract did not provide for any rent, right of occupancy or fees, there was no loss incurred by the City of Brussels in terms of rent.

46 In its observations on the statement in intervention, the applicant adds that, even if the City of Brussels could claim any amount from it for the use of public property in the City of Brussels, the only legal regime applicable would be the tax regulation of 17 October 2001, which governs, inter alia, street furniture placed on the public highway for commercial purposes without authorisation. Thus, any display listed in Annex 10 and kept in place after the expiry date stipulated in that annex

would be subject not to the payment of rent, but rather to the payment of an annual fee for occupying public property, the amount of which is negligible (EUR 223.20 per item of street furniture).

47 The Commission and the intervener dispute the applicant's arguments.

48 In that regard, it should be noted, as stated in paragraphs 29 and 30 above, that, after the entry into force of the 1999 contract, the applicant could install and use street furniture, including street furniture that could be used for advertising, in the territory of the City of Brussels only under the conditions laid down in that contract, according to which it had to pay rent and taxes.

49 However, in the light of the case-law cited in paragraph 22 above, since one of the conditions laid down in the 1999 contract was the payment of rent, the Commission was right to conclude that the fact that the applicant had continued to use of a number of displays listed in Annex 10 after the expiry dates stipulated in that annex, without paying any rent to the City of Brussels, constituted an advantage conferred through State resources for the purposes of Article 107(1) TFEU.

50 This complaint must therefore be rejected as unfounded.

– *The complaint concerning the taxes not charged*

51 As regards the taxes not charged, the applicant submits that the Commission incorrectly established the reference system. The applicant puts forward a number of arguments in that regard. First, it submits that, in the absence of a uniform system of taxation in the national territory, or even on the territory of the Brussels Capital Region, the tax regulations adopted by the City of Brussels could not constitute a reference system. Consequently, the fact that the applicant did not have to pay taxes on the street furniture used for advertising in the territory of the City of Brussels would constitute an advantage only if it could be shown that, in all the other municipalities in Belgium in which the intervener was using street furniture for advertising, it paid taxes on that furniture at the same rate and on all street furniture used for advertising. Secondly, the applicant submits that the 1984 and 1999 contracts are not subject to the tax regulation of 17 October 2001. In that regard, the applicant relies on two judgments of 4 November 2016 in which the tribunal de première instance francophone de Bruxelles (Brussels Court of First Instance (French-speaking)) found that the applicant was not liable for municipal advertising tax under the 1999 contract. Thirdly, it submits that the principle of mutability is applicable to the 1984 and 1999 contracts.

52 The Commission and the intervener dispute the applicant's arguments.

53 First, as regards the applicant's argument concerning the reference system applicable to the case at issue, it should be noted that, if that argument is to be interpreted as relating to the selective nature of the measure, it must be rejected, since, in the case of an individual measure such as that at issue in this case, the selectivity of the economic advantage is presumed (see, to that effect, judgment of 4 June 2015, *Commission* v *MOL*, C-15/14 P, EU:C:2015:362, paragraph 60).

54 In any event, the Commission did not commit an error of assessment by taking the tax regulations of the City of Brussels as the reference system, since, during the pre-litigation procedure, the Belgian authorities did not dispute that those regulations constituted the reference tax system for taxing the use of advertising displays in the territory of the City of Brussels.

55 Secondly, contrary to the applicant's claim, the use of certain displays listed in Annex 10 after the expiry dates stipulated in that annex was subject to the tax regulation of 17 October 2001, and the non-payment of taxes did have the effect of reducing the burden on the applicant's budget.

56 It is clear from the relevant provisions of the tax regulations of the City of Brussels cited in the contested decision that the tax regulation of 17 October 2001 introduced a tax on temporary advertisements in and on public property for the tax years 2002 to 2006. The same regulation provided that advertisements by the City of Brussels or bodies set up by, subordinate to or financed by the City of Brussels were exempt from tax. The City of Brussels subsequently adopted the tax regulation of 18 December 2006, which imposed the same tax and the same exemption for the 2007 tax year. From the 2008 tax year, the City of Brussels introduced a specific tax on advertising displays under the tax regulations of 17 December 2007, 15 December 2008, 9 November 2009, 20 December 2010 and 5 December 2011.

57 It is also apparent from the contested decision that, in their written observations of 20 June 2016, in response to the questions put by the Commission by letter of 15 April 2016, the Belgian authorities stated that, initially, the City of Brussels had considered, pursuant to the tax exemption for City of Brussels advertisements provided for in the tax regulation of 17 October 2001, that the street furniture covered by the 1999 contract and used for advertising was not taxable because it belonged to the City of Brussels. Accordingly, it did not charge the amounts of those taxes for the 2002 to 2009 tax years.

58 However, as stated by the Belgian authorities in their written observations of 20 February 2017, in response to the Commission's supplementary questions of 14 February 2017, the City of Brussels never used the street furniture for advertising purposes itself, and only the street furniture covered by the 1999 contract belonged to it.

59 Furthermore, the Belgian authorities stated that the City of Brussels had subsequently concluded that to exempt street furniture used for advertising from taxes solely on the ground that it belonged to the City of Brussels, even though the City of Brussels was not the operator, could be unfair to operators of other advertising displays. The City of Brussels decided to tax the street furniture used for advertising covered by the 1999 contract, and the first charges were made in 2011, relating to the 2009 tax year.

60 All those circumstances show that the tax exemption applied by the City of Brussels to the displays listed in Annex 10 and kept in place after the expiry dates stipulated in that annex was the consequence of the application to those displays of the tax exemption for City of Brussels advertisements provided for by its tax regulations, even though the City of Brussels was neither the operator nor the owner of those displays.

61 Therefore, the Commission was right to conclude that the tax regulations adopted by the City of Brussels from 2001 onwards should have applied to the displays listed in Annex 10 and kept in place after their expiry dates, and that the exemption applied by the City of Brussels before the 2009 tax year was a derogation from the reference system which constituted an advantage conferred by the City of Brussels through State resources.

62 Indeed, as the Belgian authorities themselves stated, although the City of Brussels could actually be justified in exempting from taxes street furniture used for advertising by the City of Brussels for its own purposes or those of bodies which it had set up, financed or which were subordinate to

it, such an exemption was not applicable where that furniture was used for those same purposes by a third party and, in particular, by a commercial undertaking active in the outdoor advertising sector.

63 As regards the two judgments of 4 November 2016 delivered by the tribunal de première instance francophone de Bruxelles (Brussels Court of First Instance (French-speaking)), which found that the applicant was not liable for municipal advertising tax under the 1999 contract, those judgments are irrelevant as regards the classification as State aid of the use of certain displays listed in Annex 10 after the expiry dates stipulated in that annex. As stated in paragraph 24 above, as regards the classification of a State measure as State aid, Article 107 TFEU does not distinguish between the causes or the objectives of State aid measures, but defines them in relation to their effects. Indeed, it has been held that a measure by which the public authorities grant to certain undertakings a tax exemption which, although not involving a transfer of State resources, places the beneficiaries in a more favourable financial situation than other taxpayers constitutes State aid within the meaning of Article 107(1) TFEU (see judgment of 11 September 2014, *Greece* v *Commission*, T-425/11, EU:T:2014:768, paragraph 40 and-law cited).

64 Thirdly, as regards the applicant's arguments concerning the mutability of the 1984 and 1999 contracts if they were to become taxable, it must be held, as the Commission rightly states, that the principle of mutability cannot require the City of Brussels to revise the 1984 contract. Article 7.2 of that contract expressly provides that, in the event of a change in the conditions of use, including new fiscal measures, it is for the applicant to request a revision of the conditions laid down in the contract, and not for the City of Brussels to undertake such a revision of its own motion. However, the applicant did not provide evidence that it had requested a revision of the 1984 contract.

65 In the light of all the foregoing, it must be concluded that the Commission did not make an error of assessment in finding that the applicant had saved on rent and taxes, which constituted an advantage. The second part of the first plea must therefore be rejected as unfounded.

*The third part, alleging that the 1984 and 1999 contracts are not 'purely commercial' and the conditions laid down in the case-law established by the judgment of 24 July 2003, Altmark Trans and Regierungspräsidium Magdeburg (C-280/00, EU:C:2003:415), were satisfied in the present case*

66 In the third part of the first plea, the applicant submits that, in the present case, the 1984 and 1999 contracts are not 'purely commercial' and that the compensation mechanism established by the 1984 contract satisfies the four conditions laid down in the case-law established by the judgment of 24 July 2003 *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415). Thus, the applicant submits that it was entrusted with clearly defined public service obligations, that the calculation parameters of that compensation mechanism were established in advance in an objective and transparent manner, that the compensation was limited to what was necessary to cover the costs incurred in discharging the public service obligations, and that the 1984 and 1999 contracts were awarded to it through open, transparent and non-discriminatory tender procedures.

67 The Commission and the intervener dispute the applicant's arguments.

68 A preliminary point to note is that, since the contested decision relates only to the retention of certain displays listed in Annex 10 after the expiry dates stipulated in that annex, the assessment of the conditions laid down in the case-law established by the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415), is concerned only with that retention, and the applicant's argument relating to the 1999 contract is therefore ineffective.

69 As regards the conditions laid down in the case-law established by the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415), it should be noted that, according to that case-law, where a State measure is regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such a measure is not caught by Article 107(1) TFEU.

70 However, for such compensation to escape classification as State aid in a particular case, the following four cumulative conditions must be satisfied:

– first, the recipient undertaking must actually have public service obligations to discharge and those obligations must be clearly defined;

– secondly, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner;

– thirdly, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations;

– fourthly, where the undertaking which is to discharge public service obligations is not chosen pursuant to a public procurement procedure, 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 of transport 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.

71 It is apparent from the case-law established by the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415), that the first condition is essentially intended to determine whether, first, the recipient undertaking actually has public service obligations to discharge and, secondly, whether those obligations are clearly defined in national law. That condition is designed to ensure transparency and legal certainty, and thus requires that minimum criteria be met in relation to the existence of one or more acts of public authority defining, in a sufficiently precise manner, at least the nature, duration and scope of the public service obligations imposed on the undertakings entrusted with the performance of those obligations (judgment of 20 December 2017, *Comunidad Autónoma del País Vasco and Others* v *Commission*, C-66/16 P to C-69/16 P, EU:C:2017:999, paragraphs 72 and 73).

72 In the present case, in the first place, it should be observed that none of the documentation produced by the applicant shows that the Belgian authorities defined the installation and use of street furniture such as that covered by the 1984 contract as a service of general economic interest. In the second place, as is clear from the assessment carried out in paragraphs 31 to 33 above, the applicant could not rely on having been expressly authorised by the City of Brussels to

retain and use certain displays listed in Annex 10 after their expiry dates. Consequently, it must be pointed out that there was no act of public authority which mandated the applicant to remove certain items of street furniture in the performance of a public service obligation.

73 In the light of the foregoing, it must be held that the Commission did not commit an error of assessment when it concluded that the 1984 contract was a purely commercial contract, and that the first condition of the case-law established by the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415), was therefore not satisfied.

74 According to settled case-law, the four conditions laid down in the case-law established by the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415), must be satisfied cumulatively in order for compensation for public service obligations imposed on an undertaking to escape classification as State aid (see, to that effect, judgment of 1 March 2017, *France* v *Commission*, T-366/13, not published, EU:T:2017:135, paragraph 79 and the case-law cited). It follows that where one of those conditions is not satisfied, that is sufficient to conclude that there is an advantage and therefore to classify the compensation in question as aid (judgment of 11 July 2018, *Buonotourist* v *Commission*, T-185/15, not published, EU:T:2018:430, paragraph 132).

75 It follows from all the foregoing that the third part of the first plea must be rejected.

76 In the light of those circumstances, it must be concluded that the Commission did not commit an error of assessment in finding that the retention and use of a number of displays listed in Annex 10 after the expiry date stipulated in that annex constituted an advantage, and that the first plea is unfounded.

***The second plea, alleging that the hypothetical State aid was compatible with the internal market pursuant to the Communication from the Commission on the European Union framework for State aid in the form of public service compensation and Decision 2012/21***

77 The applicant submits that the Commission made an error of law and an error of assessment in that, even if the compensation mechanism established by the 1984 contract could be classified as State aid, in view of the extensive investigative powers vested in the Commission, it should have given full effect to Article 106(2) TFEU.

78 The Commission and the intervener dispute the applicant's arguments.

79 First of all, by its second plea, the applicant seeks to challenge the Commission's assessment of the compatibility of the aid. The applicant claims that, contrary to what is stated in recital 126 of the contested decision, the Commission should have examined of its own motion the applicability of Article 106(2) TFEU to the measure in question and that, since it failed to do so, it made an error of law and an error of assessment.

80 In that connection, it must be held that, as regards the examination of whether aid is compatible with the internal market, the Member State concerned and the interested parties are free to challenge the provisional reasoning of the Commission in that respect during the formal investigation procedure. The Member State and, to a lesser extent, interested parties are generally best placed to determine whether a public interest objective was pursued when the

measure at issue was adopted, which would enable that measure to be declared wholly or partly compatible (see, to that effect, judgment of 30 April 2019, *UIPF* v *Commission*, T-747/17, EU:T:2019:271, paragraph 128).

81 Consequently, since, as stated in recital 126 of the contested decision, the Belgian authorities did not put forward any arguments, during the investigation procedure before the Commission, that any of the derogations provided for in Article 106(2) TFEU applied in the present case, the applicant cannot criticise the Commission for not examining of its own motion whether the compensation mechanism established by the 1984 contract is compatible with that article.

82 It must therefore be concluded that the Commission was right to find that the exception laid down in Article 106(2) TFEU could not be relied on. The second plea must therefore be rejected as unfounded.

***The third plea, alleging that the Commission infringed the obligation to state reasons as regards the assessment of the amount to be recovered***

*The first part, alleging that the Commission did not deal adequately with the evidence relied on by the parties, prejudged the amount of aid to be recovered in its press release, and infringed its internal rules of procedure*

83 In the first part of the third plea, the applicant submits that the Commission failed to fulfil its obligation to state reasons because it estimated the amount of aid to be recovered at approximately EUR 2 million, which corresponded to the amount put forward by the intervener, despite the fact that both the applicant and the Belgian authorities had shown that the intervener's estimates were not correct. Moreover, the Commission prejudged the amount of aid to be recovered in its press release of 24 June 2019, but did not include that amount in the contested decision. According to the applicant, the Commission should have given reasons for its decision to follow the intervener's proposal. The fact that it did not do so constitutes a failure to state reasons for the contested decision and a departure from its own State aid Manual of Procedures, which states that the requirement to state reasons should be applied more strictly in relation to points of disagreement between the parties.

84 The Commission and the intervener dispute the applicant's arguments.

85 The applicant's claims that the Commission estimated the amount of aid to be recovered at approximately EUR 2 million by accepting the assessment put forward by the intervener are based on a misreading of the contested decision.

86 It is clear from the contested decision that the reference to the amount of EUR 2 million was included in the context of setting out the estimates of the aid to be recovered which were put forward by the intervener and the Belgian authorities, and not as a reason in support of the Commission's assessment of that amount.

87 Moreover, a reading of the contested decision shows beyond doubt that the Commission did not quantify the aid to be recovered, but merely established the method for calculating the amount of that aid. In that regard, it stated that the amount was to be calculated for each display listed in Annex 10 and kept in place after its expiry date (and after 15 September 2001), taking as a reference the rent due under the 1999 contract and the taxes generally applicable to advertising

displays between the original expiry date stipulated in Annex 10 (if the original date was after 15 September 2001) or 15 September 2001 (if the original date was before 15 September 2001) and the date on which removal actually took place, without taking into account the compensation mechanism established by the 1984 contract.

88 In the light of the foregoing, the applicant's argument that the Commission accepted the amount of aid proposed by the intervener without giving reasons for its decision to follow the intervener's proposal is unfounded.

89 The first part of the third plea must therefore be rejected as unfounded.

*The second part, alleging that quantifying the amount of hypothetical State aid was impossible and constituted an obstacle to its recovery*

90 By the second part of the third plea, the applicant challenges the analysis carried out by the Commission in recitals 52, 119, 137 and 144 of the decision. First, the applicant submits that the Commission disregarded the estimates made by the Belgian authorities and accepted the aid amount proposed by the intervener. Secondly, the applicant claims that, in any event, it is impossible in practice to quantify the advantage which it enjoyed, since, in accordance with its financial structure, the 1984 contract, which governed the displays listed in Annex 10, did not provide for any rent, right of occupancy or fees and was applicable to the displays listed in Annex 10 which were kept in place after their expiry dates. Thirdly, it claims that, even if the arrangement to offset displays removed before the expiry dates stipulated in Annex 10 against displays kept in place after their expiry dates could have created an imbalance, *quod non*, the Commission could not order the recovery of the advantage derived therefrom, since in the absence of a reasonable assessment of the alleged advantage, respect for the City of Brussels' rights of defence could constitute an obstacle to its recovery in accordance with Article 16(1) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 TFEU (OJ 2015 L 248, p. 9).

91 In that regard, in its reply, the applicant adds that the failure to state reasons for the contested decision, which it relies on in the application, deprives it of the opportunity to challenge with precision the matters of law or of fact underlying the assessment of the amount of the aid. According to the applicant, the fact that it is impossible to evaluate the amount of the hypothetical advantage which it enjoyed, combined with the failure to state reasons for the contested decision, results in a breach of its rights of defence and impedes a review of the legality of the decision by the Courts.

92 The Commission and the intervener dispute the applicant's arguments. In that context, the Commission contends in the rejoinder that the complaint relating to the infringement of the applicant's rights of defence put forward in the reply is inadmissible, on the ground that, at the stage of the application, the applicant submitted that the City of Brussels' rights of defence had been infringed. The Commission submits that this new plea should be rejected as inadmissible in accordance with Article 84(1) of the Rules of Procedure of the General Court.

93 As regards the applicant's argument that the Commission rejected the estimates made by the Belgian authorities and accepted the aid amount proposed by the intervener, first, it has been found in paragraphs 87 and 88 above that the Commission had not quantified the aid to be recovered, but had merely established the method of calculating the amount of that aid without accepting the amount of aid put forward by the intervener. Secondly, the Commission explained

why, in its view, the advantage enjoyed by the applicant exceeded that estimated by the Belgian authorities. Thus, the Commission stated that it considered that the estimated EUR 200 000 value of that advantage put forward by those authorities was unfounded, since those authorities erroneously took into account the compensation mechanism established by the 1984 contract when calculating that value.

94 As regards the claim that it was impossible to quantify the advantage from which the applicant benefited and the alleged infringement of the rights of the defence as a consequence thereof, it should be stated at the outset that the applicant's argument is based on an infringement of the obligation to state reasons, which is a right of defence provided for in Article 41(1)(c) of the Charter of Fundamental Rights of the European Union. A plea involving a matter of public policy may be raised at the reply stage (see, to that effect, judgment of 20 July 2017, *Badica and Kardiam* v *Council*, T-619/15, EU:T:2017:532, paragraph 42).

95 Next, the applicant's arguments concerning the alleged impossibility of quantifying the advantage it enjoyed and the alleged infringement of its rights of defence and those of the City of Brussels are based on an incorrect premiss. The applicant submits, in essence, that the only advantage which could possibly be taken into account is that which could be created by an imbalance between the number of displays listed in Annex 10 removed before their expiry dates and the number of displays kept in place, in compensation, after the expiry dates stipulated in Annex 10. According to the applicant, the retention of certain displays listed in Annex 10 constitutes an advantage only in so far as that retention goes beyond what was offset by the compensation mechanism established by the 1984 contract. However, that premiss, which was put forward by the Belgian authorities during the pre-litigation procedure and rejected by the Commission, is not correct. As stated in paragraphs 25 to 42 above, the retention and use by the applicant of a number of displays listed in Annex 10 after the expiry dates stipulated in that annex constitute an economic advantage within the meaning of Article 107(1) TFEU. Therefore, as the Commission rightly states in the contested decision, the amount was to be calculated for each display listed in Annex 10 and kept in place after the expiry date stipulated in that annex (after 15 September 2001), taking as a reference the rent due under the 1999 contract and the taxes generally applicable to advertising displays between the original expiry date stipulated in Annex 10 (if the original date was after 15 September 2001) or 15 September 2001 (if the original date was before 15 September 2001) and the date on which removal actually took place, without taking into account the compensation mechanism established by the 1984 contract.

96 As regards the calculation method set out in the contested decision, it should be pointed out that, according to settled case-law, the Commission is not required, when it orders the restitution of aid declared incompatible with the internal market, to fix the precise amount of aid to be repaid. It is sufficient for the Commission's decision to include information enabling the recipient to work out itself, without overmuch difficulty, that amount (see judgment of 13 February 2014, *Mediaset*, C-69/13, EU:C:2014:71, paragraph 21 and the case-law cited). It is therefore sufficient, according to the case-law, for the Commission to provide a sufficiently reliable method of calculation to determine the amount of aid to be repaid (see, to that effect, judgment of 18 October 2007, *Commission* v *France*, C-441/06, EU:C:2007:616, paragraph 41), as is the case here.

97 In the light of the foregoing, the second part of the third plea and, consequently, the third plea in its entirety, must be dismissed as unfounded.

***The fourth plea, alleging that the State aid found by the contested decision was in any event time-barred***

98 In the fourth plea, the applicant challenges recitals 66 and 67 of the contested decision, arguing that the starting point for calculating an amount of aid granted in the present case is not the date on which the displays listed in Annex 10 and kept in place after the expiry date stipulated in that annex were removed, but the date of the decision to grant the compensation after the early removal of some of those displays at the request of the City of Brussels. According to the applicant, since the compensation mechanism established by the 1984 contract had already been in place since 31 July 2000, whatever the date of the decision to apply that mechanism, it would precede 15 September 2001. Recovery of any aid would therefore be time-barred, in so far as the Commission's first request for information to the Belgian authorities dates from 15 September 2011.

99 The Commission and the intervener dispute the applicant's arguments.

100 Under Article 17(1) of Regulation No 2015/1589, the powers of the Commission to recover aid are subject to a limitation period of ten years. Article 17(2) of the same regulation provides that the limitation period is to begin to run on the day on which the unlawful aid is awarded to the beneficiary, either as individual aid or as part of an aid scheme, and that any action taken by the Commission or a Member State acting at the request of the Commission with regard to the unlawful aid interrupts the limitation period.

101 According to the case-law, the determination of the date on which aid was granted may vary depending on the nature of the aid in question, so that, in the case of a multi-annual scheme, entailing payments or advantages granted on a periodic basis, the date on which an act forming the legal basis of the aid is adopted and the date on which the undertakings concerned will actually be granted the aid may be a considerable period of time apart. In such a case, for the purpose of calculating the limitation period, the aid must be regarded as not having been awarded to the beneficiary until the date on which it was in fact received by the beneficiary (judgment of 8 December 2011, *France Télécom* v *Commission*, C-81/10 P, EU:C:2011:811, paragraph 82).

102 In the present case, the State measure regarded by the Commission as constituting State aid is the retention and use by the applicant, without paying rent or taxes, of a number of displays listed in Annex 10 between the expiry date stipulated in that annex and the date on which removal actually took place.

103 In the light of that characteristic of the aid in question, irrespective of the date prior to 31 July 2000 on which the decision on the alleged compensation mechanism established by the 1984 contract was taken, the date from which the applicant actually benefited from the advantage consisting of the non-payment of rent and taxes in respect of the displays listed in Annex 10 and kept in place beyond the expiry dates stipulated for them in that annex is precisely the date on which those displays should have been removed. Consequently, it is that date which constitutes the date on which the aid was granted to the applicant, for the purposes of Article 17(2) of Regulation 2015/1589, and thus the date from which the limitation period began to run.

104 Furthermore, in the present case, the aid entailed advantages granted on a periodic basis, since the taxes and rent for the displays listed in Annex 10 which were kept in place and used after the expiry dates stipulated for them in that annex were due on a periodic basis until the date of their permanent removal.

105 Lastly, since the Commission's first request for information to the Belgian authorities dates from 15 September 2011, any aid granted to the applicant before 15 September 2001 is in any event time-barred.

106 Consequently, the method for calculating the amount of aid established by the Commission, according to which the amount must be calculated for each display listed in Annex 10 and kept in place after the expiry date stipulated in that annex (and after 15 September 2001), taking as a reference the rent due under the 1999 contract and the taxes generally applicable to advertising displays between the original expiry date stipulated in Annex 10 (if the original date was after 15 September 2001) or 15 September 2001 (if the original date was before 15 September 2001) and the date on which removal actually took place, without taking into account the compensation mechanism established by the 1984 contract, is correct.

107 It follows that, contrary to what the applicant submits, the contested decision is not vitiated by illegality, in so far as the Commission considered that the State aid which it found was not time-barred.

108 In the light of the foregoing, the fourth plea and, consequently, the action in its entirety must be dismissed.

## Costs

109 Under Article 134(1) of the Rules of Procedure, the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings.

110 Since the applicant has been unsuccessful, it must, in accordance with the form of order sought by the Commission, be ordered to pay, in addition to its own costs, the costs incurred by the Commission. Since the intervener has not requested that the applicant be ordered to pay the costs, it must therefore bear its own costs.

On those grounds,

THE GENERAL COURT (First Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders JCDecaux Street Furniture Belgium to bear its own costs and pay those incurred by the European Commission;**

3. **Orders Clear Channel Belgium to bear its own costs.**

Kanninen Jaeger Stancu

Delivered in open court in Luxembourg on 7 September 2022.

[Signatures]