Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

20 December 2017*

(Appeal — State aid — Digital television — Aid for the deployment of digital terrestrial television in remote and less urbanised areas — Subsidies granted to operators of digital terrestrial television platforms — Decision declaring the aid incompatible in part with the internal market — Concept of 'State aid' — Advantage — Service of general economic interest — Definition — Discretion of the Member States)

In Case C-81/16 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 12 February 2016,

Kingdom of Spain, represented by M.A. Sampol Pucurull, M.J. García-Valdecasas Dorrego and A. Rubio González, acting as Agents,

appellant,

the other party to the proceedings being:

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

defendant at first instance,

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Chamber, C. Vajda, E. Juhász, K. Jürimäe (Rapporteur) and C. Lycourgos, Judges,

Advocate General: M. Wathelet,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 7 September 2017,

gives the following

* Language of the case: Spanish.

Judgment

1 By its appeal, the Kingdom of Spain seeks the annulment of the judgment of the General Court of the European Union of 26 November 2015, *Spain* v *Commission* (T-461/13, 'the judgment under appeal', EU:T:2015:891), by which the General Court dismissed its actions for annulment of Commission Decision 2014/489/EU of 19 June 2013 on State aid SA.28599 ((C 23/2010) (ex NN 36/2010, ex CP 163/2009)) implemented by the Kingdom of Spain for the deployment of digital terrestrial television in remote and less urbanised areas (outside Castilla-La Mancha) (OJ 2014 L 217, p. 52; 'the decision at issue').

Background to the dispute and the decision at issue

2 The factual background to the dispute was set out by the General Court in paragraphs 1 to 22 of the judgment under appeal. For the purposes of the present proceedings, they may be summarised as follows.

3 The present case concerns a series of measures implemented by the Spanish authorities in relation to the switch-over from analogue broadcasting to digital broadcasting throughout Spain, apart from the Comunidad Autónoma de Castilla-La Mancha (Autonomous Community of Castilla-La Mancha, Spain) ('the measure at issue').

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

5 In order to enable the switch-over from analogue television to DTT, the Spanish authorities divided the Spanish territory into three separate areas: 'Area I', 'Area II' and 'Area III'. Area II, the area at issue in the present proceedings, includes remote and less urbanised regions representing 2.5% of the Spanish population. In that area, due to a lack of commercial interest, broadcasters did not invest in digitisation, which led the Spanish authorities to put public funding in place.

6 In September 2007, the Consejo de Ministros (Council of Ministers, Spain) adopted the National Plan for the Transition to DTT, the objective of which was to achieve a rate of coverage of the Spanish population by DTT comparable to the rate of coverage of that population by analogue television in 2007, that is to say, more than 98% of that population and all or virtually all of the population in the Autonomous Communities of the Basque Country, Catalonia and Navarre (Spain).

7 In order to achieve the coverage objectives set out for DTT, the Spanish authorities made provision for the grant of public funding, in order inter alia to support the terrestrial digitisation process in Area II and, more particularly, within the regions of the Autonomous Communities in that area.

8 In February 2008, the Ministerio de Industria, Turismo y Comercio (the Ministry of Industry, Tourism and Trade, Spain; 'the MITT') adopted a decision aimed at improving the telecommunications infrastructures and establishing the criteria and distribution of the funding for the actions aimed at developing the information society under a plan called the 'Plan Avanza'. The budget approved under that decision was allocated in part to the digitisation of television in Area II.

9 That digitisation was carried out between July and November 2008. The MITT subsequently transferred funds to the Autonomous Communities, which undertook to fund the remaining costs of the operation from their own budgets.

10 In October 2008, the Council of Ministers decided to allocate additional funding in order to extend and complete DTT coverage within the context of the digital switch-over projects scheduled to be completed during the first half of 2009.

11 The Autonomous Communities subsequently began the process of extending DTT coverage. In order to do so, they organised calls for tenders or entrusted that extension to private undertakings. In some cases, the Autonomous Communities asked the municipal authorities to implement that extension.

12 On 18 May 2009 the European Commission received a complaint from SES Astra SA concerning a State aid scheme implemented by the Kingdom of Spain in relation to the switch-over from analogue television to DTT in Area II. According to SES Astra, that scheme constituted non-notified aid liable to distort competition between the terrestrial and satellite broadcasting platforms.

13 By letter of 29 September 2010 the Commission informed the Kingdom of Spain that it had decided to initiate the procedure laid down in Article 108(2) TFEU in respect of the aid scheme at issue for the whole territory of Spain, with the exception of the Autonomous Community of Castilla-La Mancha, for which a separate procedure was opened.

14 The Commission subsequently adopted the decision at issue, in which Article 1 of the operative part states that the State aid granted to the operators of the terrestrial television platform for the deployment, maintenance and operation of the DTT network in Area II was put into effect in breach of Article 108(3) TFEU, and that it is incompatible with the internal market, except for the aid which was granted in compliance with the principle of technological neutrality. Article 3 of the operative part of that decision orders the recovery of that incompatible aid from the DTT operators, whether they received the aid directly or indirectly.

15 In the grounds of the decision at issue, the Commission considered, in the first place, that the various acts adopted at the central level and the agreements concluded between the MITT and the Autonomous Communities constituted the basis of the aid scheme for the extension of DTT in Area II. In practice, the Autonomous Communities applied the Spanish Government's guidelines on the extension of DTT.

16 In the second place, the Commission found that the measure at issue had to be regarded as State aid within the meaning of Article 107(1) TFEU. In that respect, the Commission noted, in particular, that the Spanish authorities had put forward only the case of the Autonomous Community of the Basque Country in order to support their claim that the measure did not constitute State aid according to the conditions laid down by the Court of Justice in the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, '*Altmark*', EU:C:2003:415). However, the first condition laid down in that judgment ('the first *Altmark* condition'), according to which the recipient undertaking must actually be required to discharge public service obligations and those obligations must be clearly defined, was not satisfied, in the Commission's view. In addition, the failure to ensure the least costs to that Autonomous Community meant that the fourth condition laid down in that judgment ('the fourth *Altmark* condition') was not satisfied either.

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

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

The procedure before the General Court and the judgment under appeal

19 By application lodged at the Registry of the General Court on 30 August 2013, the Kingdom of Spain brought an action for the annulment of the decision at issue.

20 In support of its action, the Kingdom of Spain raised five pleas in law. The first plea alleged infringement of Article 107(1) TFEU. The second plea, raised in the alternative, concerned the compatibility of the alleged aid at issue with the internal market. That plea alleged failure to observe the authorisation conditions referred to in Article 106(2) TFEU and Article 107(3)(c) TFEU. By the third plea, the Kingdom of Spain alleged a breach of the procedural rules. The fourth plea, raised in the alternative, related to the demand for recovery of the aid and alleged a breach of the principles of legal certainty, equal treatment, proportionality and subsidiarity. By the fifth plea, the Kingdom of Spain alleged, in the alternative, a breach of the fundamental right to receive information relating to the recovery of the aid.

21 The General Court rejected the first plea as unfounded.

22 In that respect, the General Court rejected the Kingdom of Spain's arguments that, because the beneficiaries received no economic advantage, the measure at issue could not be characterised as 'State aid' within the meaning of Article 107(1) TFEU since the conditions laid down by the Court of Justice in the judgment of 24 July 2003, *Altmark* (C-280/00, EU:C:2003:415) were satisfied.

23 As regards the first *Altmark* condition, relating to the discharge of public service obligations, the General Court held, in paragraphs 53 to 78 of the judgment under appeal, that the Kingdom of Spain had not demonstrated that the Commission had erred in considering that, in the absence of a clear definition of service at issue — namely the deployment, maintenance and operation of the DTT network in Area II — as a public service, that condition was not satisfied.

24 As regards the fourth *Altmark* condition, relating to ensuring the least cost for the community, the General Court held, in paragraphs 79 to 83 of the judgment under appeal, that the Kingdom of Spain also had not shown that the Commission had erred in concluding that that condition was not satisfied, since the Kingdom of Spain had merely argued, in essence, that, by comparison with the satellite platform, the terrestrial platform was the most cost-efficient solution, because the infrastructure for analogue terrestrial television already existed.

25 The General Court also rejected, on the merits, the Kingdom of Spain's line of argument relating to an alleged infringement of Article 107(3)(c) TFEU, as well as its three other pleas in law and, consequently, rejected the action in its entirety.

Forms of order sought

26 By its appeal, the Kingdom of Spain claims that the Court should:

– set aside the judgment under appeal;

– annul the contested decision; and

– order the Commission to pay the costs.

27 The Commission asks the Court to dismiss the action and order the Kingdom of Spain to pay the costs.

The appeal

28 The Kingdom of Spain relies on two grounds in support of its appeal.

The first ground of appeal

29 The first ground of appeal alleges an error of law in relation to the review of the definition and implementation by the Member States of a service of general economic interest (SGEI). That ground of appeal is divided into two parts.

The first part

– *Arguments of the parties*

30 By the first part of its first ground of appeal, the Kingdom of Spain criticises paragraphs 53 to 78 of the judgment under appeal in relation to the General Court's examination of the assessment carried out by the Commission that led it to conclude that the first *Altmark* condition was not satisfied.

31 The Kingdom of Spain submits that the General Court based its reasoning on erroneous premisses since it held, first, that it was not necessary to take into consideration, in addition to the legislative framework, all of the acts by which the Spanish authorities entrusted the operators concerned with the performance of public service obligations, secondly, that the Kingdom of Spain had not provided it with any contract imposing public service obligations on those operators and, thirdly, that no Autonomous Community other than the Basque Country had put forward a line of argument capable of showing that the operation of the terrestrial network was a public service. It follows that the General Court did not carry out a sufficiently substantiated examination in order to determine whether the Spanish authorities had made a manifest error in exercising their discretion as regards the definition of the SGEI at issue.

32 In the first place, according to the Kingdom of Spain, the General Court's analysis of the legislative framework is manifestly erroneous. Ley 32/2003, General de Telecomunicaciones (General Law 32/2003 on Telecommunications) of 3 November 2003 (BOE No 264, of 4 November 2003, p. 38890) expressly classifies the operation of radio and television networks as an SGEI and, in the light of the case-law, the relevance of that law cannot be dismissed on the ground that it applies to all and not to certain operators in the sector.

33 In the second place, the acts of national law and the contracts concluded by the Spanish authorities not only define and entrust the performance of the SGEI to certain operators, but also expressly refer to terrestrial technology. Those acts were taken into account by the Commission, inter alia in recitals 23 to 36 of the decision at issue, and by the General Court in concluding that there was State aid.

34 In that respect, the Kingdom of Spain submits that the evidence that could be adduced in the context of the judicial proceedings, in this case the contracts imposing public service obligations, are not relevant for reviewing the legality of a decision of the Commission. In addition, the procedural obligations that must be complied with include the obligation for the Commission to examine, carefully and impartially, all the relevant elements and to state reasons for its decision.

35 In this case, the Commission should have taken account of the calls for tenders organised in some Autonomous Communities, which, as is, moreover, apparent from the description of the measure at issue, inter alia in recitals 32 to 34 of the decision at issue, form an integral part of that measure.

36 In the third place, the Kingdom of Spain submits that the General Court could not assert that no Autonomous Community other than the Basque Country had demonstrated that operating the terrestrial network was an SGEI, since the Commission examined a sample of 82 calls for tenders in order to assess the compatibility of the aid with the internal market, as is apparent from footnote 29 in the decision at issue. Consequently, the General Court did not verify whether the Commission had indeed examined all the elements relevant to the definition of the public service at issue.

37 The Commission submits that this part is ineffective and, in any event, inadmissible and unfounded.

– *Findings of the Court*

38 By the first part of its first ground of appeal, the Kingdom of Spain submits, in essence, that the General Court's examination, as regards the first *Altmark* condition, is vitiated by several errors of law.

39 In the first place, as regards the alleged error made by the General Court in the assessment of national law, it must be noted that, in paragraph 66 of the judgment under appeal, the General Court did acknowledge that General Law 32/2003 classifies the operation of radio and television networks as a 'service of general interest'.

40 However, the General Court considered, in paragraph 67 of the judgment under appeal, that the mere fact that a service is designated in national law as being of general interest does not mean that any operator providing that service is entrusted with performing clearly defined public service obligations within the meaning of the first *Altmark* condition. In addition, it noted that it did not follow from General Law 32/2003 that all telecommunications services in Spain were in the nature of SGEIs within the meaning of the judgment of 24 July 2003, *Altmark* (C-280/00, EU:C:2003:415) and that that law expressly provided that all services of general interest within the meaning of that law had to be supplied in the context of a framework of free competition.

41 In paragraph 68 of the judgment under appeal, the General Court also noted that the provisions of General Law 32/2003 were technologically neutral and that telecommunications were the transmission of signals through any telecom network and not through the terrestrial network in particular. The General Court considered that, in the light of those clarifications of Spanish law, it could not be concluded that, in that law, the operation of a terrestrial network was defined as being a public service within the meaning of the judgment of 24 July 2003, *Altmark* (C-280/00, EU:C:2003:415).

42 In that respect, in accordance with the Court's settled case-law, it has jurisdiction, on appeal, only to verify whether the national law was distorted, which must be obvious from the documents on its file (see, to that effect, judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraph 20 and the case-law cited).

43 In the present case, the Kingdom of Spain has not pleaded and, a fortiori, has not demonstrated any such distortion of national law. Indeed, it has neither contended nor established that the General Court made findings manifestly at odds with the content of the provisions of Spanish law at issue or ascribed to one of those provisions a scope that it manifestly does not have in the light of other material in the file.

44 Incidentally, if the Kingdom of Spain also alleges that the General Court erred in its legal characterisation of General Law 32/2003, it must be noted, as the Advocate General pointed out, in points 155 and 156 of his Opinion, that, in the light of the ambiguous aspects of that law referred to in paragraphs 40 and 41 of the present judgment, the General Court's assessment that that law did not justify the conclusion that undertakings operating a terrestrial network had been entrusted with clearly defined public service obligations, in accordance with the first condition of the judgment of 24 July 2003, *Altmark* (C-280/00, EU:C:2003:415), is not vitiated by any error of law (judgment delivered today, *Comunidad Autónoma del País Vasco and Others* v *Commission*, C-66/16 P to C-69/16 P, paragraph 102).

45 In the second place, the Kingdom of Spain's argument mentioned in paragraphs 33 to 35 of the present judgment is based on a misreading of the judgment under appeal.

46 First, contrary to the Kingdom of Spain's allegations, the General Court did not hold that it was not necessary to take into account all the acts by which the Spanish authorities entrusted the performance of public service obligations to the operators concerned.

47 It is apparent from paragraphs 69 to 73 of the judgment under appeal that, on the contrary, the General Court examined the Kingdom of Spain's argument that those operators were entrusted with the performance of such obligations, in particular in the public contracts concluded between those operators and the Spanish authorities, and in the interinstitutional conventions concluded between the Basque Government, the association of Basque municipalities and the three Basque provincial governments.

48 In that context, the General Court held, in paragraph 71 of the judgment under appeal, that the mandate entrusting the public service tasks may encompass contractual acts, provided that they emanate from the public authority and are binding, a fortiori where such acts give effect to the obligations imposed by the legislation.

49 However, in the same paragraph, the General Court rejected the Kingdom of Spain's line of argument on the ground that, in this case, the latter had not adduced any contract that could substantiate its assertions and that it could not be inferred that the service at issue had the status of an SGEI, without any specific explanation on the part of the authorities concerned, merely because it formed the subject matter of a public contract.

50 In addition, as can be seen from paragraph 72 of the judgment under appeal, the General Court rejected the Kingdom of Spain's arguments concerning the Commission's findings that the operation of the terrestrial network was not defined as a public service in the interinstitutional conventions, on the ground that those findings were not disputed before it by the Kingdom of Spain.

51 Secondly, the Kingdom of Spain's argument that the General Court wrongly criticised it for failing to adduce, in the judicial proceedings, any contract in which the public service obligations were defined must be rejected as unfounded, since it is based on a misreading of that judgment.

52 Contrary to the Kingdom of Spain's assertions, the General Court did not criticise it for failing to provide the public contracts necessary to assess the service at issue. As can be seen from paragraph 77 of the judgment under appeal, the General Court correctly held that the Kingdom of Spain could not take issue with the Commission for having based its analysis on the factual elements available to it when the decision at issue was adopted. According to the settled case-law of the Court of Justice, which the General Court correctly referred to in that paragraph, the legality of a decision concerning State aid must be assessed in the light of the information available to the Commission when that decision was adopted (see, inter alia, order of 4 September 2014, *Albergo Quattro Fontane and Others* v *Commission*, C-227/13 P to C-239/13 P, not published, EU:C:2014:2177, paragraph 77 and the case-law cited).

53 In the third place, as the Advocate General stated in point 159 of his Opinion, the argument alleging that the General Court did not examine all the relevant elements concerning the definition of the public service at issue, since the Commission examined a sample of 82 calls for tenders in order to assess the compatibility of the aid with the internal market, cannot be accepted. That circumstance does not mean that an Autonomous Community other than the Basque Country demonstrated that the service of operating the terrestrial network was an SGEI within the meaning of the judgment of 24 July 2003, *Altmark* (C-280/00, EU:C:2003:415).

54 It follows from all the foregoing considerations that the first part of the first ground of appeal must be rejected.

The second part

– Arguments of the parties

55 By the second part of the first ground of appeal, the Kingdom of Spain criticises, more specifically, paragraphs 81 and 82 of the judgment under appeal, in which the General Court held, in the context of its assessment of the fourth *Altmark* condition, that the comparison with satellite technology did not suffice, in the case of the Basque Country, to demonstrate that the undertaking at issue was the most efficient undertaking.

56 The Commission submits that the Kingdom of Spain's arguments are unclear and inadmissible or, in any event, unfounded.

– Findings of the Court

57 Since the present part of the first ground of appeal concerns an alleged error made by the General Court in examining the fourth *Altmark* condition, it must be noted that, in view of the cumulative nature of the *Altmark* conditions, even if the General Court erred in considering that one of those conditions was not satisfied, that could not bring about the annulment of the judgment under appeal if the General Court also held, without erring in law, that another of those conditions was not satisfied (judgment delivered today, *Comunidad Autónoma del País Vasco and Others* v *Commission*, C-66/16 P to C-69/16 P, paragraph 49).

58 It is clear from the examination of the first part of the first ground of appeal that the General Court did not err in law in rejecting the Kingdom of Spain's arguments challenging the findings, in recitals 119 to 126 of the decision at issue, that the first *Altmark* condition was not satisfied.

59 In those circumstances, the second part of the first ground of appeal must be regarded as being ineffective.

60 The first ground of appeal must therefore be rejected in its entirety.

The second ground of appeal

Arguments of the parties

61 The Kingdom of Spain maintains that the General Court erred in law, in paragraphs 101 to 110 of the judgment under appeal, in its analysis of the compatibility of the aid with the internal market for the purpose of Article 107(3)(c) TFEU. The Kingdom of Spain submits that the General Court's reasoning

contains several errors which demonstrate that it did not carry out its judicial review in accordance with the case-law arising from the judgment of 15 February 2005, *Commission* v *Tetra Laval* (C-12/03 P, EU:C:2005:87, paragraph 39).

62 In the first place, the Kingdom of Spain submits that the General Court did not duly verify the accuracy of the elements on which the decision at issue is based, by holding, in paragraph 104 of the judgment under appeal, that the Commission was not required to provide the details of the sample of calls for tenders it took into account in order to conclude that the principle of technological neutrality had not been respected. In that regard, the case-law cited in that paragraph by the General Court is not relevant, because, in the cases that gave rise to that case-law, the individual calls for tenders did not form part of the description of the aid measure. In the present case, as can be seen from recitals 23 to 36 of the decision at issue, the calls for tenders formed an integral part of the measure at issue.

63 In the second place, according to the Kingdom of Spain, the General Court did not verify the reliability and the consistency of the sample of calls for tenders on which the Commission relied and whether it had used the relevant data. Thus, the General Court erred in law by holding, in paragraph 108 of the judgment under appeal, that the Spanish authorities had failed to provide the information necessary to support a finding that the aid was compatible. First, the Commission itself decided to analyse a sample provided by the Spanish authorities and it indicated before the General Court that it was not aware of the number of calls for tenders it had examined. Secondly, the issue of the reliability of the sample provided by the Spanish authorities in the judicial proceedings is, in any event, irrelevant, since the review of the legality of the decision at issue had to be carried out on the basis of the information available when that decision was adopted.

64 In the third place, by confirming the Commission's conclusion that the measure at issue was not technologically neutral, the General Court rectified, by means of its own reasoning, the shortcomings in the decision at issue.

65 In its reply, the Kingdom of Spain specifies that the second ground of appeal concerns the Commission's negligence in failing to examine all the calls for tenders provided by the Spanish authorities. That issue concerns the Commission's exercise of its discretion and is thus subject to appeal.

66 The Commission submits, as a preliminary point, that the present ground of appeal does not concern paragraph 96 of the judgment under appeal and that, consequently, it cannot be understood as calling into question the compatibility of the aid as regards Article 106(2) TFEU. In addition, according to the Commission, by this ground of appeal, the Kingdom of Spain asks the Court of Justice to review, of its own motion, the judgment of the General Court and thus seeks to introduce, at the appeal stage, questions which were not raised before the General Court, as a result of which this ground is inadmissible.

67 Moreover, it submits that the Kingdom of Spain's criticisms of the General Court's analysis of the sample of calls for tenders are unfounded.

68 In its rejoinder, the Commission submits that it is clear from the Kingdom of Spain's reply that, contrary to Article 127(1) of the Rules of Procedure of the Court of Justice, it extends the second ground of appeal to the matters covered by its first ground of appeal. The Kingdom of Spain thus alleges, in general, inadequate judicial review also as regards the first ground of appeal, even though the first ground of appeal indicates that it concerns only the General Court's alleged error of law as regards the existence of an SGEI.

Findings of the Court

69 By the second ground of appeal, the Kingdom of Spain submits that the General Court made several errors of law in examining the Commission's analysis of the compatibility of the measure at issue with the internal market for the purpose of Article 107(3)(c) TFEU.

70 It must be borne in mind that, according to the settled case-law of the Court of Justice, to which the General Court correctly referred in paragraph 99 of the judgment under appeal, in the context of the review conducted by the European Union judicature of complex economic assessments made by the Commission in the field of State aid, it is not for that judicature to substitute its own economic assessment for that of the Commission. However, the European Union judicature must, inter alia, establish not only whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the relevant information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (see, inter alia, judgment of 24 October 2013, *Land Burgenland and Others* v *Commission*, C-214/12 P, C-215/12 P and C-223/12 P, EU:C:2013:682, paragraphs 78 and 79 and the case-law cited).

71 First of all, it is necessary to reject the Kingdom of Spain's argument that the General Court failed to verify the factual accuracy of the evidence on which the Commission relied in order to conclude in the decision at issue that the measure at issue could not be regarded as being compatible with the internal market under Article 107(3)(c) TFEU, on the ground that that measure did not respect the principle of technological neutrality.

72 It is not apparent from the application for annulment that the Kingdom of Spain alleged before the General Court that the Commission had relied on elements which were factually inaccurate.

73 Moreover, the Kingdom of Spain's argument can be summarised as contesting the assertion, in paragraph 104 of the judgment under appeal, that the Commission was not required to provide more details as regards the non-compliance with the principle of technological neutrality than those set out in recitals 148 to 171 of the decision at issue, on the ground that the case-law on which the General Court relied in that paragraph was not applicable in the present case.

74 In paragraph 104 of the judgment under appeal, the General Court rightly referred to the case-law of the Court of Justice, according to which, in the case of an aid scheme, the Commission may confine itself to examining the characteristics of the scheme at issue in order to determine, in the grounds of its decision, whether that scheme is necessary for the attainment of one of the objectives specified in Article 107(3) TFEU. Thus, in a decision which concerns such a scheme, the Commission is not required to carry out an analysis of the aid granted in individual cases under the scheme. It is only at the stage of recovery of the aid that it is necessary to look at the individual situation of each undertaking concerned (judgment of 13 June 2013, *HGA and Others* v *Commission*, C-630/11 P to C-633/11 P, EU:C:2013:387, paragraph 114 and the case-law cited).

75 It suffices to note that the Kingdom of Spain does not dispute that the measure at issue constituted an aid scheme within the meaning of the case-law cited in the previous paragraph, such that that case-law is applicable to it. In that respect, the Kingdom of Spain's allegation that, in this case, the individual calls for tenders at issue form part of the description of the aid measure is irrelevant.

76 Next, the Kingdom of Spain's argument that the General Court did not verify the reliability and the consistency of the sample of the calls for tenders on which the Commission relied also cannot be accepted.

77 It is apparent from paragraph 106 of the judgment under appeal that the General Court carried out such a verification in order to address the Kingdom of Spain's argument that the sample of calls for tenders used by the Commission was not representative. The General Court held that, even if, out of

the 82 calls for tenders analysed by the Commission, 65 were calls for tenders for supply which were not affected by the decision at issue, the 17 calls for tenders relating to the extension of the network that were analysed represented, in any event, a sufficiently relevant sample in this case, having regard in particular to the fact that the administrative procedure related to 16 Autonomous Communities in Spain.

78 In its appeal, the Kingdom of Spain has not put forward any arguments alleging that that assessment is manifestly erroneous nor, a fortiori, adduced elements capable of giving rise to such a conclusion.

79 Lastly, since the Kingdom of Spain merely asserts that the General Court rectified the shortcomings in the decision at issue with its own reasoning, and does not state the reasons which led it to put forward that argument, or even indicate the paragraphs of the judgment under appeal to which it refers, that argument is inadmissible.

80 Accordingly, the second ground of appeal must be rejected as being partly inadmissible and partly unfounded.

81 It follows that the appeal must be dismissed in its entirety.

Costs

82 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to the costs. Under Article 138(1) of those rules, applicable to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

83 Since the Commission has applied for costs and the Kingdom of the Spain has been unsuccessful, the latter must be ordered to pay the costs.

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

1. Dismisses the appeal;

2. Orders the Kingdom of Spain to pay the costs.

[Signatures]