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-70/16 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 5 February 2016,

Comunidad Autónoma de Galicia,

Redes de Telecomunicación Galegas Retegal SA (Retegal), established in Santiago de Compostela (Spain),

represented by F.J. García Martínez and B. Pérez Conde, abogados,

appellants,

the other parties to the proceedings being:

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

defendant at first instance,

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

intervener 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,

* Language of the case: Spanish.

having regard to the written procedure,

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

gives the following

Judgment

1 By their appeal, the Comunidad Autónoma de Galicia (Autonomous Community of Galicia, Spain) and Redes de Telecomunicación Galegas Retegal SA (Retegal) ask the Court to set aside the judgment of the General Court of the European Union of 26 November 2015, *Comunidad Autónoma de Galicia and Retegal* v *Commission* (T-463/13 and T-464/13, 'the judgment under appeal', not published, EU:T:2015:901), by which the General Court dismissed their 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 cases concern 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 applications lodged at the Registry of the General Court on 30 August 2013, the appellants brought actions for annulment of the decision at issue.

20 By order of 9 February 2015, after hearing the parties, the General Court decided to join the cases for the purposes of the oral procedure and the judgment.

21 In support of their actions, the appellants put forward four pleas in law. The first plea alleged infringement of Article 107(1) TFEU. The other pleas were put forward in the alternative. The second and third pleas concerned the compatibility of the aid at issue with the internal market. Those pleas alleged that the Commission had disregarded the authorisation conditions referred to in Article 106(2) TFEU and Article 107(3)(c) TFEU. By their fourth plea, the appellants argued that the Commission had erroneously characterised Retegal as a 'beneficiary of unlawful State aid'.

22 By the judgment under appeal, the General Court rejected each of the pleas on the substance and, accordingly, dismissed the actions in their entirety.

Forms of order sought by the parties

23 By their appeal, the appellants claim that the Court should:

– set aside the judgment under appeal;

– give a definitive ruling on the actions for annulment and annul the decision at issue; and

– order the Commission to pay the costs.

24 The Commission and SES Astra claim that the Court should dismiss the appeal and order the appellants to pay the costs.

The appeal

25 The appellants rely on four grounds in support of their appeal. The first ground of appeal alleges an error of law in that the General Court did not partially annul the decision at issue, even though it upheld the appellants' fourth plea for annulment, alleging an error of assessment as regards the

characterisation of Retegal as a beneficiary of unlawful aid. The second ground of appeal alleges an infringement of Article 107(1) TFEU, in that the General Court held that the requirements to classify the measure at issue as State aid were met. The third ground of appeal alleges a breach of the duty to state reasons and infringement of Article 107(1) TFEU, in that the Commission wrongly concluded that the measure at issue was selective. The fourth ground of appeal alleges an error of law in the interpretation of Article 14 TFEU, Article 106(2) TFEU and Protocol (No 26) on services of general economic interest.

The first ground of appeal

Arguments of the parties

26 By their first ground of appeal, the appellants submit that the General Court erred in law in that, following its analysis of their fourth plea for annulment, it should have upheld their actions in part, in accordance with Article 264 TFEU.

27 First, the appellants submit that, as the General Court itself acknowledged, in paragraph 160 of the judgment under appeal, the operative part of a Commission decision must be read in the light of the recitals of that decision. It is true that the operative part of the decision at issue does not expressly identify the beneficiaries or the amount of the aid. However, the reference, in the operative part, to Section 6.2 of that decision and, accordingly, to recitals 193 and 194 thereof, deprives the findings in paragraphs 149 to 163 of the judgment under appeal of any legal effect.

28 Secondly, according to the appellants, in view of Articles 13 and 14 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1), the General Court could not validly state, in paragraph 153 of the judgment under appeal, that recitals 193 and 194 of the decision at issue merely provided information necessary for the recovery of the unlawful aid at issue.

29 Thirdly, although the General Court held, in the judgment under appeal, that no inferences should be drawn from the recitals in the decision at issue in which the Commission identified the beneficiaries and the amount of the aid to be recovered, it wrongly omitted to reflect that finding in the operative part of that judgment.

30 Fourthly, the appellants submit that, because of that omission, the Spanish authorities will not be able to assess the scope of the decision at issue in the proceedings for the recovery of the unlawful aid at issue, contrary to what is required by, inter alia, the principle of legal certainty.

31 The Commission submits that the first ground of appeal is based on a misreading of the judgment under appeal, since, contrary to what is claimed by the appellants, that judgment does not accept any of the arguments raised by the appellants at first instance.

32 SES Astra submits that the first ground of appeal is manifestly inadmissible since it is actually intended to contest the factual assessments made by the General Court.

Findings of the Court

33 By their first ground of appeal, the appellants submit, in essence, that the grounds of the judgment under appeal in which the General Court upheld their fourth plea for annulment, alleging an error of assessment in the characterisation of Retegal as a beneficiary of the unlawful aid at issue, should have led to the annulment in part of the decision at issue.

34 Since the appellants' argument concerns an alleged inconsistency between the grounds and the operative part of the judgment under appeal, SES Astra's argument that that ground of appeal is inadmissible must be rejected.

35 As to the substance, that ground is based on a reading of the contested judgment which is manifestly incorrect.

36 It is clear from paragraphs 151 and 160 of that judgment that — contrary to the appellants' assertions — the General Court did not uphold their fourth plea for annulment, but rather rejected it as ineffective.

37 It follows, in that respect, from paragraph 153 of the judgment under appeal that the General Court, inter alia, addressed the appellants' arguments by noting that, in recitals 189 to 195 of the decision at issue, set out in section 6.2 of that decision, the Commission merely provided the Kingdom of Spain with information concerning the recipients of the measure at issue so that that Member State could fulfil its obligations, laid down in Articles 3 and 4 of that decision, to recover the aid and inform the Commission.

38 The General Court also noted in that paragraph that, in so far as the Commission had considered in recital 193 of the decision at issue, first, that the situation in Galicia fell into the category of aid schemes in which the extension of the network was entrusted to a public undertaking acting as a network operator and, secondly, that Retegal was the beneficiary of the measure at issue in Galicia, those considerations constituted a preliminary evaluation, at the stage of that decision, concerning the assessment of the legality of the aid schemes at issue. It held that those considerations did not constitute a legally binding statement of position as regards the situation in Galicia and the characterisation of Retegal as a beneficiary of the aid, since, in accordance with recital 189 of the decision at issue, that situation remained subject to the Spanish authorities' evaluation.

39 Thus, in paragraph 160 of the judgment under appeal, the General Court concluded that it was for the Kingdom of Spain to determine, in the context of the recovery of the aid at issue, referred to in Article 4 of the decision at issue, whether the aid at issue in Galicia was exempt from the recovery obligation as regards the elements in Article 1 and 3 of that decision, read in the light of recitals 185 and 186 thereof. Accordingly, since the appellants submitted, in essence, that the Commission had made erroneous findings as regards the aid to be recovered in Galicia, the General Court held that that line of argument was ineffective.

40 Consequently, the first ground of appeal must be rejected as manifestly unfounded.

The second ground of appeal

Arguments of the parties

41 By their second ground of appeal, the appellants submit that the General Court misconstrued the scope of the review which it had to carry out, in accordance with the case-law of the Court and the General Court, in that it confirmed the classification of the measure at issue as State aid on the basis of paragraphs 57, 61 and 79 of the judgment under appeal. They submit, in that respect, that the General Court did not verify the accuracy of the circumstances relied on by the Commission and failed to take account of evidence put forward before it concerning, inter alia, the economic nature of the activity concerned.

42 First, the General Court gave a manifestly incorrect description of the activity at issue in Galicia by stating, inter alia in paragraph 61 of the judgment under appeal, that the DTT network was capable of commercial use, even though the appellants had demonstrated at first instance that that was not the case, because of the technical characteristics and the level of equipment of that network and because of the applicable legislation. The General Court thereby distorted the relevant facts of the case and disregarded the case-law on the scope of judicial review in relation to State aid.

43 Secondly, by failing to take into account in the judgment under appeal that the network at issue is not operated commercially and that it is not designed to be operated commercially, the General Court did not carry out a comprehensive review of whether the measure at issue fell within the scope of Article 107(1) TFEU. According to the national legislation, the service of transmitting the DTT signal is provided exclusively by the municipalities, in cooperation with the Autonomous Communities. That service may be provided only in the areas where there is no DTT coverage, and without remuneration. It does not involve any distortion of competition and was categorised as a public service in national law.

44 Thirdly, the General Court distorted national law, and in particular the Twelfth Additional Provision of Royal Decree 944/2005, by asserting, in paragraph 79 of the judgment under appeal, that the network at issue could be used for the provision of services other that DTT, whereas it is clear from that legislation that that network could be used only for DTT.

45 The Commission and SES Astra contend that the second ground of appeal is inadmissible. First, it is intended to challenge factual assessments made by the General Court. Secondly, it merely repeats arguments already put forward before the General Court.

Findings of the Court

46 The appellants' second ground of appeal relates to the General Court's allegedly erroneous assessments in paragraphs 57, 61 and 79 of the judgment under appeal, concerning the economic nature of the activity at issue in Galicia. According to the appellants, those assessments led the General Court to make an error of law in characterising the measure at issue as 'State aid', within the meaning of Article 107(1) TFEU.

47 Under the second subparagraph of Article 256(1) TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union, an appeal lies on points of law only. The General Court thus has exclusive jurisdiction to find and appraise the relevant facts and to assess the evidence. The appraisal of those facts and the assessment of that evidence therefore does not, save where they distort the evidence, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal (see, inter alia, order of 21 April 2016, *Dansk Automat Brancheforening* v *Commission*, C-563/14 P, not published, EU:C:2016:303, paragraph 26 and the case-law cited).

48 Moreover, it follows from those provisions and from Article 168(1)(d) of the Rules of Procedure of the Court of Justice that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and the legal arguments specifically advanced in support of the appeal. Where, without even including an argument specifically identifying the error of law allegedly vitiating the judgment under appeal, an appeal merely repeats or reproduces verbatim the pleas in law and arguments previously submitted to the General Court, including those based on facts expressly rejected by that Court, it fails to satisfy the requirements to state reasons under the above provisions. Such an appeal amounts in reality to no more than a request for re-examination of the application submitted to the General Court, which the Court of Justice does not have jurisdiction to undertake (see, inter alia, order of 21 April 2016, *Dansk Automat Brancheforening* v *Commission*, C-563/14 P, not published, EU:C:2016:303, paragraph 27 and the case-law cited).

49 In the first place, it must be noted that, in essence, by the present ground of appeal, the appellants are precisely attempting to call into question the findings and factual assessments made by the General Court in its examination of the first and second parts of the first plea for annulment, by essentially repeating the same arguments that they raised before the General Court. In doing so, they are in reality seeking a re-examination of the facts and evidence that they put forward at first instance to show, first, that the tasks performed by the Autonomous Community of Galicia constituted the exercise of public powers and not an economic activity and, secondly, that the measure at issue did not involve any transfer of resources.

50 In the second place, as regards the distortions of the facts and of national law alleged by the appellants, it should be noted that, under the provisions mentioned in paragraph 47 above, the appellants must indicate precisely the elements alleged to have been distorted by the General Court and show the errors of appraisal which, in their view, led to that distortion. In addition, according to the Court of Justice's settled case-law, that distortion must be obvious from the documents in the Court's file, without any need to carry out a new assessment of the facts and the evidence (see, to that effect, judgment of 30 November 2016, *Commission* v *France and Orange*, C-486/15 P, EU:C:2016:912, paragraph 99 and the case-law cited).

51 Accordingly, the arguments alleging a distortion of the facts must be rejected in their entirety, since, by their line of argument, the appellants have not put forward any element from which it is obvious that the General Court indeed distorted the facts.

52 In those circumstances, the second ground of appeal must be rejected as being inadmissible.

The third ground of appeal

Arguments of the parties

53 By their third ground of appeal, the appellants submit that the General Court failed to comply with its obligation to state reasons and made an error of assessment in confirming, in paragraph 85 of the judgment under appeal, recital 113 of the decision at issue as regards the selectivity of the aid.

54 In their view, the General Court did not indicate how the situation in the municipalities in Area II in Galicia, namely those that use terrestrial technology, is comparable to that of municipalities in which other technologies, such as satellite technology, are used. Examining whether situations are comparable is a prerequisite for establishing the selectivity of the aid.

55 The Commission contends that this ground of appeal is ineffective and entirely unfounded. It submits that, if a measure, which is not a general measure, applies exclusively to a specific economic sector or to undertakings in a particular geographic area, the selectivity condition is satisfied. In this case, even if the aid had been granted in compliance with the principle of technological neutrality, it would still be a selective measure, since it applies to a specific economic sector, namely the broadcasting sector, and not to all economic operators.

56 SES Astra submits that this ground of appeal is manifestly inadmissible and, in any event, unfounded.

Findings of the Court

57 By their third ground of appeal, the appellants take issue with paragraph 85 of the judgment under appeal in that it confirms the Commission's analysis concerning the selectivity of the measure at issue.

58 The condition relating to the selectivity of the advantage is a constituent factor in the concept of 'State aid' within the meaning of Article 107(1) TFEU, since this provision prohibits aid 'favouring certain undertakings or the production of certain goods'. It is clear from the Court's settled case-law that the assessment of that condition requires it to be determined whether, under a particular legal regime, a national measure is such as to favour 'certain undertakings or the production of certain goods' over others which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation (judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraph 41 and the case-law cited).

59 It addition, it must be borne in mind that the General Court's assessment as to the adequacy or inadequacy of the statement of reasons is reviewable by the Court on appeal (judgments of 28 June 2005, *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 453, and of 26 July 2017, *Council* v *Hamas*, C-79/15 P, EU:C:2017:584, paragraph 51 and the case-law cited). In that respect, the statement of reasons required under Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent Court of the European Union to exercise its jurisdiction to review legality (judgment of 8 March 2017, *Viasat Broadcasting UK* v *Commission*, C-660/15 P, EU:C:2017:178, paragraph 43 and the case-law cited). As regards the examination of the condition relating to the selectivity of an aid measure, the Court has held that that examination must be supported by sufficient reasons to allow full judicial review, in particular of the question whether the situation of operators benefiting from the measure is comparable with that of operators excluded from it (judgment of 21 December 2016, *Commission* v *World Duty Free Group SA and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 94).

60 In this case, in paragraph 86 of the judgment under appeal, the General Court addressed the appellants' argument at first instance that the statement of reasons concerning the selectivity of the measure at issue, as set out in recital 113 of the decision at issue, was inadequate. The General Court rejected that argument, since that statement of reasons indicated that the measure at issue benefited only the broadcasting sector and that, within that sector, the measure at issue concerned only the undertakings active on the terrestrial platform market.

61 That reasoning is vitiated by an error of law. The statement of reasons in the decision at issue — like, moreover, the statement of reasons in the judgment under appeal — contains no indication of the reasons why undertakings active in the broadcasting sector should be regarded as being in a factual and legal situation comparable to that of undertakings active in other sectors or why undertakings using terrestrial technology should be regarded as being in a factual and legal situation comparable to that of undertakings using other technologies. The Commission's argument that no reasoning was necessary in that respect, since the selectivity condition is automatically satisfied if a measure applies exclusively to a specific economic sector or to undertakings in a particular geographic area, cannot be accepted. The Court has held that a measure which benefits only one economic sector or some of the undertakings in that sector is not necessarily selective. It is selective only if, within the context of a particular legal regime, it has the effect of conferring an advantage on certain undertakings over others, in a different sector or the same sector, which are, in the light of the objective pursued by that regime, in a comparable factual and legal situation (judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraph 58).

62 That failure to state reasons constitutes an infringement of essential procedural requirements and therefore impedes judicial review by the EU judicature.

63 In these circumstances, the third ground of appeal must be upheld.

The fourth ground of appeal

64 By their fourth ground of appeal, the appellants allege an error of law in the interpretation of Article 14 TFEU, Article 106(2) TFEU and Protocol (No 26) on services of general economic interest. This ground of appeal is divided into three parts:

The first part

– *Arguments of the parties*

65 The first part of the present ground of appeal alleges an error of law concerning the discretion enjoyed by the Member States as regards the definition of the service of general economic interest (SGEI) at issue.

66 The appellants submit that the General Court erred in law in paragraphs 99, 101 and 111 of the judgment under appeal, where it held that the operation of the terrestrial network was not defined as an SGEI within the meaning of the first *Altmark* condition. They submit, in that respect, that the General Court merely ruled out, as a matter of principle, the possibility that the operation of that network could be defined as an SGEI, without analysing the particular features of the infrastructure in Area II and, in particular, whether that infrastructure could be operated commercially.

67 According to the appellants, the General Court confined itself to examining, in paragraphs 100 to 105 of the judgment under appeal, the national laws on telecommunications, without taking account of the fact that, in accordance with the case-law of the Court of Justice and of the General Court, the public service tasks were defined by means of various successive official acts, and, in particular, by the Twelfth Additional Provision of Royal Decree 944/2005, which governs interventions by regional and local authorities in the provision of public services, and by the partnership agreements concluded between the State, the Autonomous Community of Galicia and the municipalities of Galicia. The General Court therefore mistook the true nature of the service at issue.

68 The General Court wrongly confined itself to noting that the operation of the terrestrial network was not defined in national law as a public service, without taking account of the particular circumstances characterising the existing infrastructure in Area II of Galicia. In addition, the appellants submit that, as regards the entities to which the public service tasks are entrusted, the national legislation clearly specifies that the public service tasks are entrusted to municipalities in partnership with the Autonomous Community of Galicia. Lastly, as regards the issue whether the public service obligations are well defined by national law, the appellants indicate that the Twelfth Additional Provision of Royal Decree 944/2005 specifies that the local and regional authorities are entrusted with providing the service of DTT broadcasting to the public in those areas under the conditions laid down by national law.

69 In doing so, the General Court disregarded the discretion enjoyed by the Member States in defining an SGEI.

70 The Commission and SES Astra contend that the arguments put forward in support of this part are in part inadmissible and in part ineffective.

– *Findings of the Court*

71 By the first part of their fourth ground of appeal, the appellants submit, in essence, that the General Court made several errors of assessment of national law, as a result of which it overlooked the fact that the national law contained a clear definition of the service of transmitting DTT as a public service within the meaning of the judgment of 24 July 2003, *Altmark* (C-280/00, EU:C:2003:415).

72 It must be borne in mind that, in accordance with settled case-law of the Court of Justice referred to in paragraph 50 of the present judgment, with respect to the assessment, in the context of an appeal, of the General Court's determinations on national law, the Court of Justice has jurisdiction only to determine whether that law was distorted. In that regard, a distortion must be obvious from the documents on the Court's file, without there being any need to carry out a new assessment of the facts and the evidence.

73 In the present case, in paragraph 99 of the judgment under appeal, the General Court rejected the appellants' line of argument according to which the Commission had wrongly considered that, since the service of operating the terrestrial network was not clearly defined as a public service, the first *Altmark* condition was not satisfied. It is apparent from paragraph 98 of the judgment under appeal that that line of argument is based essentially on the premiss that Spanish television and the service of transmitting television broadcasts are public services under Spanish legislation.

74 It must be pointed out that, by alleging that the General Court made several errors of law in assessing that legislation, the appellants are merely — without invoking any distortion — criticising the General Court's interpretation of national law, in particular the Twelfth Additional Provision of Royal Decree 944/2005, set out in, inter alia, paragraphs 100 to 102 of the judgment under appeal, in order to replace it with a different interpretation and, accordingly, obtain a new assessment of the facts. They in no way seek to establish that the General Court made findings which were manifestly at odds with the content of that national law or that it attached significance to that content which was manifestly inappropriate in the light of the elements in the file.

75 In those circumstances, the appellants' argument alleging errors in the assessment of national law is inadmissible.

76 In addition, since the appellants also submit that the General Court's assessment led it to deny the Member States' discretion to define SGEIs, it must be noted that the General Court specifically held, in paragraph 95 of the judgment under appeal, that those Member States have a wide discretion concerning that definition and, consequently, that the definition of those services by a Member State may be called into question by the Commission only in the event of manifest error.

77 In that respect, and as, moreover, the appellants acknowledge, the General Court noted, in paragraph 97 of the judgment under appeal, that, in its review, it must nevertheless ensure that certain minimum criteria are met relating, inter alia, to the presence of an act of public authority entrusting SGEI tasks to the operators in question and to the universal and obligatory nature of those tasks.

78 As the Advocate General pointed out in point 136 of his Opinion, the General Court observed, in paragraph 110 of the judgment under appeal, that the appellants were not at any time able to determine what public service obligations were entrusted to DTT network operators, either by Spanish law or by the operating conventions, let alone adduce evidence to that effect.

79 Accordingly, the appellants' argument that the General Court ruled out, as a matter of principle, the possibility that the operation of that network could be defined as an SGEI must be held to be unfounded.

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

The second part

– Arguments of the parties

81 By the second part of the present ground of appeal, the appellants allege that the General Court disregarded the limits of 'manifest error', in its examination of the national law defining the SGEI at issue.

82 The appellants submit that the General Court erred in law, in paragraph 112 of the judgment under appeal, by simply confirming the content of recital 121 of the decision at issue, according to which the definition of the operation of a particular transmission platform — in this case that of the terrestrial platform — as a public service would have constituted a manifest error on the part of the Spanish authorities. The General Court did not examine whether there was a manifest error in the definition of the SGEI at issue and merely stated that there was no clear and specific definition of that SGEI.

83 According to the appellants, the General Court thus overlooked the fact that the Member States' discretion allows them to choose a particular means of performing the SGEI, such as, in this case, the terrestrial platform. The appellants argue, in that respect, that there is a contradiction with paragraph 78 of the judgment of 26 November 2015, *Comunidad Autónoma del País Vasco and Itelazpi* v *Commission* (T-462/13, EU:T:2015:902), in which the General Court held that the Commission had wrongly found, in recital 121 of the decision at issue, a manifest error on the part of the Spanish authorities in defining the SGEI at issue. The appellants thus submit that, since there was a market failure on the market concerned in the area in question, a public interest and an objective of universality laid down in the relevant national law, the definition of that service contained the essential elements for its definition as an SGEI.

84 The Commission and SES Astra contend that the present part is inadmissible.

– Findings of the Court

85 By the second part of the fourth ground of appeal, the appellants criticise, in essence, paragraph 112 of the judgment under appeal, in which the General Court found that it followed from recital 121 of the decision at issue that the definition of the operation of the terrestrial platform as a public service constituted a manifest error by the Spanish authorities.

86 It must be pointed out that the present part is a new argument which was not submitted to the General Court for its assessment and which is therefore inadmissible on appeal.

87 It is clear from paragraph 112 of the judgment under appeal that the appellants did not challenge recital 121 of the decision at issue.

88 According to settled case-law of the Court of Justice, in an appeal the jurisdiction of the Court is confined to reviewing the findings of law on the pleas argued before the General Court (order of 16 February 2017, *Monster Energy* v *EUIPO*, C-502/16 P, not published, EU:C:2017:139, paragraph 5 and the case-law cited).

89 Consequently, the argument raised in support of the present part must be rejected as inadmissible.

The third part

– *Arguments of the parties*

90 By the third part of the present ground of appeal, the appellants allege that the General Court erred in law by distorting a provision of national law, namely Circular 1/2010 of the Committee on the Spanish Telecommunications Market, which was an element indicating the nature of the service at issue.

91 The appellants submit that, in paragraph 109 of the judgment under appeal, the General Court rejected their argument concerning Circular 1/2010 on the ground that it was not adduced before it. This gives rise to an inconsistency with the other grounds in that paragraph which concern the issue of the interpretation of national law and the rules of procedure of the Court of Justice, and results in a breach of the appellants' rights of defence. The appellants submit that the General Court adopted a measure of organisation of procedure requesting the Commission to produce certain elements of national law, which did not include that circular. They maintain that the content and the binding nature of that circular are not disputed by the parties to the dispute. Lastly, the fact that the service of transmitting DTT is excluded from the scope of Circular 1/2010 implies that that service should be considered to be a public service.

92 The Commission contends that, in so far as the appellants acknowledge that the definition of the service at issue as a public service is not set out in Circular 1/2010, it is difficult to see how an alleged distortion of the national law is relevant. In addition, the appellants do not indicate what that distortion might consist of. In any event, the General Court did not err in law in paragraph 109 of the judgment under appeal.

93 SES Astra submits that that part is inadmissible because the appellants have not indicated how Circular 1/2010 is relevant in order to have the judgment under appeal set aside.

– *Findings of the Court*

94 By the third part, the appellants submit, in essence, that the General Court wrongly rejected their line of argument relating to Circular 1/2010 on the ground that that circular had not been produced before it, whereas the General Court could have requested that it be produced.

95 That part is ineffective. It is apparent from paragraph 109 of the judgment under appeal that the General Court did not merely reject the appellants' line of argument concerning Circular 1/2010 on the ground that that circular had not been produced before it, but stated, as a secondary point, that that line of argument did not establish that the service of operating a terrestrial network had been defined as a public service within the meaning of the judgment in 24 July 2003, *Altmark* (C-280/00, EU:C:2003:415). The appellants have not put forward any concrete argument calling that finding into question.

96 Since the third ground of appeal has been upheld, the judgment under appeal must be set aside on that basis.

The action before the General Court

97 In accordance with the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the appeal is well founded and the decision of the General Court is set aside, the Court of Justice may itself give final judgment in the matter where the state of the proceedings so permits. That is the case here.

98 In that respect, for the reasons set out in paragraphs 60 to 62 of this judgment, the decision at issue must be annulled for infringement of essential procedural requirements.

Costs

99 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is well founded and the Court itself gives final judgment in the case, 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.

100 Since the appellants' appeal has been upheld and the decision at issue annulled, the Commission must be ordered to pay, in addition to its own costs, the costs incurred by the appellants in the present appeal and at first instance, in accordance with the form of order sought by the appellants.

101 In accordance with Article 140(3) of the Rules of Procedure of the Court, SES Astra, as an intervener before the General Court and before the Court of Justice, must bear its own costs.

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

1. **Sets aside the judgment of the General Court of the European Union of 26 November 2015, *Comunidad Autónoma de Galicia and Retegal* v *Commission* (T-463/13 and T-464/13, not published, EU:T:2015:901);**

2. **Annuls 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);**

3. **Orders the European Commission to bear the costs incurred by the Comunidad Autónoma de Galicia (Autonomous Community of Galicia, Spain) and Redes de Telecomunicación Galegas Retegal SA (Retegal) in the present appeal and at first instance;**

4. **Orders SES Astra SA to bears its own costs.**

[Signatures]