Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

4 March 2020*

(Appeal — Competition — State aid — Undertaking operating bus route networks in the Regione Campania (Campania Region, Italy) — Compensation for public service obligations paid by the Italian authorities following a judgment of the Consiglio di Stato (Council of State, Italy) — European Commission decision declaring the aid measure unlawful and incompatible with the internal market)

In Case C-586/18 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 19 September 2018,

Buonotourist Srl, established in Castel San Giorgio (Italy), represented by M. D'Alberti and L. Visone, avvocati,

appellant,

the other parties to the proceedings being:

European Commission, represented by G. Conte, P.J. Loewenthal and L. Armati, acting as Agents,

defendant at first instance,

Associazione Nazionale Autotrasporto Viaggiatori (ANAV), established in Rome (Italy), represented by M. Malena, avvocato,

intervener at first instance,

THE COURT (Ninth Chamber),

composed of S. Rodin, President of the Chamber, D. Šváby and K. Jürimäe (Rapporteur), Judges,

Advocate General: E. Tanchev,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: Italian.

Judgment

1 By its appeal, Buonotourist Srl asks the Court to set aside the judgment of the General Court of the European Union of 11 July 2018, *Buonotourist* v *Commission* (T-185/15, not published, EU:T:2018:430; 'the judgment under appeal'), by which the General Court dismissed its action for annulment of Commission Decision (EU) 2015/1075 of 19 January 2015 on State aid SA.35843 (2014/C) (ex 2012/NN) implemented by Italy — Additional public service compensation for Buonotourist (OJ 2015 L 179, p. 128; 'the contested decision').

Legal context

2 Article 1 of Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (OJ, English Special Edition 1969 (I), p. 276), provides:

'1. Member States shall terminate all obligations inherent in the concept of a public service as defined in this Regulation imposed on transport by rail, road and inland waterway.

2. Nevertheless, such obligations may be maintained in so far as they are essential in order to ensure the provision of adequate transport services.

…

4. Financial burdens devolving on transport undertakings by reason of the maintenance of the obligations referred to in paragraph 2, or of the application of the transport rates and conditions referred to in paragraph 3, shall be subject to compensation made in accordance with common procedures laid down in this Regulation.'

3 Under Article 2(1), (2) and (5) of that regulation:

'1. "Public service obligations" means obligations which the transport undertaking in question, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions.

2. Public service obligations within the meaning of paragraph 1 consist of the obligation to operate, the obligation to carry and tariff obligations.

…

5. For the purposes of this Regulation, "tariff obligations" means any obligation imposed upon transport undertakings to apply, in particular for certain categories of passenger, for certain categories of goods, or on certain routes, rates fixed or approved by any public authority which are contrary to the commercial interests of the undertaking and which result from the imposition of, or refusal to modify, special tariff provisions.

The provisions of the foregoing subparagraph shall not apply to obligations arising from general measures of price policy applying to the economy as a whole or to measures taken with respect to transport rates and conditions in general with a view to the organisation of the transport market or of part thereof.'

4 Articles 10 to 13 of that regulation lay down the common methods for calculating the compensation referred to in Article 6 and Article 9(1) of that regulation.

5 Article 17(2) of Regulation No 1191/69 provides:

'Compensation paid pursuant to this Regulation shall be exempt from the preliminary information procedure laid down in Article [108](3) [TFEU].'

6 In accordance with Article 12 thereof, Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ 2007 L 315, p. 1) entered into force on 3 December 2009.

7 Article 3 of Regulation No 1370/2007, entitled 'Public service contracts and general rules', provides in paragraphs 1 and 2:

'1. Where a competent authority decides to grant the operator of its choice an exclusive right and/or compensation, of whatever nature, in return for the discharge of public service obligations, it shall do so within the framework of a public service contract.

2. By way of derogation from paragraph 1, public service obligations which aim at establishing maximum tariffs for all passengers or for certain categories of passenger may also be the subject of general rules. In accordance with the principles set out in Articles 4 and 6 and in the Annex, the competent authority shall compensate the public service operators for the net financial effect, positive or negative, on costs incurred and revenues generated in complying with the tariff obligations established through general rules in a way that prevents overcompensation. This shall be so notwithstanding the right of competent authorities to integrate public service obligations establishing maximum tariffs in public service contracts.'

8 Article 4 of that regulation specifies the mandatory content of public service contracts and general rules.

9 Article 6 of that regulation, entitled 'Public service compensation', provides:

'1. All compensation connected with a general rule or a public service contract shall comply with the provisions laid down in Article 4, irrespective of how the contract was awarded. All compensation, of whatever nature, connected with a public service contract awarded directly in accordance with Article 5(2), (4), (5) or (6) or connected with a general rule shall also comply with the provisions laid down in the Annex.

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

Background to the dispute and the contested decision

10 The factual background to the dispute was set out by the General Court in paragraphs 1 to 39 of the judgment under appeal. For the purposes of the present proceedings, they may be summarised as follows.

11 The appellant is a private company providing local public transport services based on regional and municipal concessions. In particular, it provided bus services as the concessionaire of the Regione Campania (Campania Region, Italy) ('the Region'). Over the years, the appellant's business has been governed by a number of successive legislative and regulatory provisions.

The actions brought by the appellant before the national courts

12 By action of 5 January 2007, the appellant sought a declaration from the Tribunale amministrativo regionale di Salerno (Regional Administrative Court, Salerno, Italy) that it was entitled to receive from the Region the sum of EUR 5 567 582.57 by way of compensation for the economic costs incurred in discharging the public service obligations ('PSOs') arising from the concessions granted by the Region for the years 1996 to 2002 ('the relevant period') under Regulation No 1191/69.

13 By judgment of 28 August 2008, the Tribunale amministrativo regionale di Salerno (Regional Administrative Court, Salerno) dismissed that action, taking the view that the appellant was not entitled to receive compensation for the economic disadvantages resulting from the imposition of PSOs, without having first requested the removal of those PSOs.

14 The appellant brought an appeal against that judgment before the Consiglio di Stato (Council of State, Italy). By Decision No 4683/2009 of 27 July 2009 ('the decision of 27 July 2009'), that court upheld the appellant's appeal, holding that the appellant was entitled to the compensation sought in accordance with Articles 6, 10 and 11 of Regulation No 1191/69.

15 According to the Consiglio di Stato (Council of State), the precise amount of the compensation owed to the appellant had to be determined by the Region on the basis of reliable data taken from the appellant's accounts, showing the difference between the costs attributable to the portion of the appellant's activities associated with the PSO and the corresponding revenue.

16 Since the Region did not determine the amount of that compensation, the appellant brought judicial proceedings for enforcement of the decision of 27 July 2009 before the Consiglio di Stato (Council of State). In the course of those proceedings, two experts were appointed. Those proceedings were concluded by Decision No 5650/2012 of the Consiglio di Stato (Council of State) of 7 November 2012 ('the decision of 7 November 2012'), which fixed the amount of compensation due in respect of the tariff obligations at EUR 838 593.21, plus EUR 272 979.13 by way of interest. Payment of that sum was made by the Region to the appellant on 21 December 2012.

The administrative procedure

17 On 5 December 2012, the Italian authorities notified the Commission, in accordance with Article 108(3) TFEU, of State aid consisting of additional compensation granted to the appellant, pursuant to the decision of 7 November 2012, for the provision of passenger transport services by bus on the basis of concessions issued by the Region during the relevant period ('the measure at issue').

18 That measure was treated as a non-notified measure, since, according to the information available to the Commission, the Region was required to pay the appellant the additional compensation due to it from 7 December 2012, that is to say, after the Italian State had notified the measure at issue, but before the Commission took its decision.

19 By letter of 20 February 2014, the Commission notified the Italian Republic of its decision to open the formal investigation procedure laid down in Article 108(2) TFEU.

The contested decision

20 On 19 January 2015, the Commission adopted the contested decision, by which it found that the measure at issue constituted State aid, within the meaning of Article 107(1) TFEU, incompatible with the internal market, which was granted to the appellant in infringement of Article 108(3) TFEU, and ordered its recovery from appellant by the Italian authorities.

21 In the first place, in recitals 54 to 69 of the contested decision, the Commission found that the measure at issue was attributable to the State, involved the use of State resources, conferred an economic advantage on the appellant, was selective in nature and was liable to distort competition to the extent that it affected trade between Member States. In that context, the Commission observed that that measure did not satisfy two of the conditions identified by the Court of Justice in the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415) ('the Altmark conditions'). The Commission concluded, in recital 70 of the contested decision, that the measure at issue constituted aid, within the meaning of Article 107(1) TFEU.

22 In the second place, the Commission examined, in recitals 72 to 88 of the contested decision, the question of whether the measure at issue could be regarded, in the light of Article 17(2) of Regulation No 1191/69, as compensation exempt from the preliminary notification obligation laid down in Article 108(3) TFEU.

23 As part of that examination, in recitals 75 to 81 of the contested decision, the Commission determined whether the Italian authorities had unilaterally imposed PSOs on the appellant, within the meaning of Article 1 of Regulation No 1191/69. In that regard, the Commission found that neither the Italian authorities nor the appellant were able to provide it with any mandate for the relevant period. In particular, although the imposition of certain PSOs could be inferred from legge regionale n. 16 — Interventi regionali in materia di servizi di trasporto pubblico local per viaggiatori (Regional Law No 16 on regional interventions for local public transport services for passengers), of 25 January 1983 (GURI No 118 of 2 May 1983 and BU Campania No 11), Article 2 of that law solely provided that 'potential losses and deficits not covered by regional subsidies … remained payable by the operators'. Similarly, although some of the regional measures relied on by the appellant indicated the existence of certain contractual obligations during the relevant period, those measures did not clearly identify obligations which were capable of constituting PSOs, whilst being possible indications of their potential existence, and, in any event, their contractual nature precluded those obligations being imposed unilaterally. As regards, more specifically, the existence of a tariff obligation justifying the measure at issue, the Commission took the view that it had no evidence that such an obligation had actually been imposed on the appellant.

24 In recitals 82 to 87 of the contested decision, the Commission ascertained whether the compensation granted to the appellant complied with the common method of compensation laid down in Regulation No 1191/69 in order to be exempted from the obligation to provide preliminary information laid down in Article 17 of that regulation. The Commission concluded that that additional compensation was not exempt from the preliminary information procedure provided for in that article.

25 In the third place, in recitals 89 to 102 of the contested decision, the Commission examined the compatibility of the measure at issue with the legislation in force on the date on which that decision was adopted, namely Regulation No 1370/2007. It concluded that the compensation granted to the appellant, in implementation of the decision of 7 November 2012, had not been paid in accordance with that regulation and, therefore, that the measure at issue was incompatible with the internal market.

The procedure before the General Court and the judgment under appeal

26 By application lodged at the General Court Registry on 14 April 2015, the appellant brought an action for the annulment of the contested decision.

27 In support of its action, the appellant put forward eight pleas in law.

28 The first plea alleged infringement of Articles 93, 107, 108 and 263 TFEU, read in conjunction with Article 17 of Regulation No 1191/69, a misuse of power, a lack of competence on the part of the Commission and infringement of the right to a fair hearing.

29 The second plea alleged infringement of Article 4 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), as regards Articles 107 and 108 TFEU, and infringement of fairness in the procedure, as well as a misuse of power.

30 The third plea alleged infringement and misinterpretation of Articles 93 to 108 TFEU, read in conjunction with Article 17 of Regulation No 1191/69 and Article 9 of Regulation No 1370/2007, infringement of the 'principles of protection of legitimate expectations, tempus regit actum and of the retroactivity of judicial decisions', a misuse of power, a lack of 'logical consistency', 'irrationality', the 'extremely abnormal nature' of the contested decision and a failure to state reasons.

31 The fourth plea alleged infringement of Article 1(f) and (g) and Articles 4, 7 and 15 of Regulation No 659/1999, Articles 93, 107 and 108 TFEU, a misuse of power, a complete failure to satisfy a necessary condition, infringement of Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), of Article 258 et seq. TFEU and of Article 17 of Regulation No 1191/69.

32 The fifth plea alleged infringement of Articles 93, 107, 108 and 267 TFEU, of Articles 6 and 13 of the ECHR, the Commission's lack of competence, a misuse of power and infringement of the principle of procedural autonomy.

33 The sixth plea alleged infringement of Articles 6, 7 and 13 of the ECHR, of Articles 93 to 108 and 258 et seq. TFEU, read in conjunction with Article 101 of the Costituzione (Constitution), and of Article 2909 of the codice civile (Civil Code), a lack of competence on the part of the Commission, a misuse of power and infringement of the principles of protection of legitimate expectations and legal certainty.

34 The seventh plea alleged infringement of Articles 11 and 17 of Regulation No 1191/69 and of Articles 93 to 108 TFEU, a misuse of power, a failure to state reasons for the contested decision, inadequacy of the investigation and erroneous nature of a prior condition.

35 The eighth plea alleged infringement of Articles 1 to 11 and 17 of Regulation No 1191/69, of Articles 93 to 108 TFEU and of 'Articles 44 to 46 and 48 of the Rules of Procedure of the General Court No 659/1999', a misuse of power, a failure to investigate and to state reasons, and the erroneous nature of a prior condition.

36 By the judgment under appeal, the General Court rejected each of those pleas and therefore dismissed the action in its entirety.

Forms of order sought

37 By its appeal, the appellant claims that the Court should:

– set aside the judgment under appeal;

– give a definitive ruling on its action for annulment and annul the contested decision; and

– order the Commission to pay the costs.

38 The Commission contends that the Court should:

– dismiss the appeal, and

– order the appellant to pay the costs.

The appeal

39 In support of its appeal, the appellant relies on five grounds of appeal, which will be assessed in the order in which they were submitted.

The first ground of appeal

Arguments of the parties

40 By its first ground of appeal, the appellant submits that, in paragraphs 57 to 120 of the judgment under appeal, the General Court erred in law in finding that the measure at issue constituted new aid subject to the notification obligation laid down in Article 108(3) TFEU, and not existing aid exempt from that obligation, in accordance with Article 108(1) TFEU and Article 17(2) of Regulation No 1191/69.

41 It maintains, relying on the circumstances which led to the adoption of the decision of 7 November 2012, that that decision cannot be regarded as capable of introducing a compensation measure for PSOs. In the appellant's view, it is a judgment declaring a pre-existing right, based on Regulation No 1191/69.

42 In any event, according to the appellant, the conditions laid down in Regulation No 1191/69 are satisfied. In the first place, there are indeed tariff obligations to be borne by the appellant, which arise from national law, to which the General Court itself explicitly referred in paragraph 110 of the judgment under appeal, namely legge regionale n. 9 — Disciplina e coordinamento tariffario dei servizi di trasporto di competenza regionale (Regional Law No 9 on the discipline and coordination of regional transport services), of 26 January 1987 (BU Campania of 2 February 1987) and the deliberation of the Assessore ai trasporti (Transport Assessor, Italy). In the second place, the criterion relating to the *ex ante* fixing of the amount of compensation provided for in Article 13 of Regulation No 1191/69 was, in the present case, complied with in the context of the decision of 7 November 2012.

43 The Commission takes the view that the plea must be dismissed as inadmissible and, in any event, unfounded.

Findings of the Court

44 By its first ground of appeal, the appellant disputes, in essence, the grounds of the judgment under appeal, by which the General Court rejected what the General Court considered to be the first part of its fourth and eighth pleas for annulment, alleging that the compensation forming the subject matter of the measure at issue constituted existing aid, exempt from the obligation to provide preliminary information, pursuant to Article 17 of Regulation No 1191/69.

45 As regards the question whether the compensation which was the subject matter of the contested decision was a measure introduced by the decision of 7 November 2012 or whether it originated, as the appellant submits, in the legislative framework governing the PSOs to which it was subject and under which the Consiglio di Stato (Council of State) recognised the right to such compensation, the

General Court noted, first, in paragraph 94 of the judgment under appeal, that the aid which was the subject of the measure at issue had in fact been granted to the appellant as an additional measure for the tariff obligations to which it had been subject under Article 11 of Regulation No 1191/69.

46 In paragraph 95 of that judgment, the General Court concluded that the question of whether that measure constituted existing aid, within the meaning of Article 1(b)(v) of Regulation No 659/1999, required a determination of whether that measure fulfilled the substantive criteria laid down by Regulation No 1191/69, in order to be exempt from the obligation of preliminary notification under Article 17(2) of that regulation.

47 Second, like the Commission, the General Court held, in paragraph 96 of that judgment, that Article 17(2) of Regulation No 1191/69 required, inter alia, that PSOs be imposed unilaterally and that compensation be calculated in accordance with the method laid down in Articles 10 to 13 of that regulation.

48 In that regard, in paragraph 106 of that judgment, the General Court noted that since the measure at issue had been granted to the appellant by the Consiglio di Stato (Council of State) on the basis of that regulation, namely as compensation for a tariff obligation, it was for the General Court to verify whether such an obligation, consisting of the imposition of fixed or officially approved prices, existed, as required by Article 2(5) of Regulation No 1191/69.

49 At the end of that examination, set out in paragraphs 106 to 112 of the judgment under appeal, the General Court upheld, in paragraph 113 of that judgment, the Commission's finding, in recital 79 of the contested decision, that the Commission had no evidence that pricing obligations had actually been imposed on the appellant. In those circumstances, in paragraph 114 of that judgment, the General Court held that it was not necessary to analyse whether the alleged tariff measure was unilateral in nature.

50 In the light of the cumulative nature of the conditions for exemption laid down in Regulation No 1191/69, the General Court held, in paragraph 115 of the judgment under appeal, that it was not necessary to examine whether the measure at issue satisfied the other conditions laid down by that regulation. In paragraph 116 of that judgment, however, it held that, in any event, the Commission was entitled to take the view that the criterion for determining *ex ante* the amount of compensation was not satisfied.

51 The General Court therefore held, in paragraph 120 of the judgment under appeal, that, since the measure at issue failed to comply with at least one of the substantive criteria laid down in Regulation No 1191/69, the Commission had been right to conclude that that measure could not be exempted from the obligation of preliminary notification under Article 17(2) of that regulation and, consequently, had to be categorised not as existing aid but as new aid to be notified to the Commission, in accordance with Article 108(3) TFEU.

52 Although the arguments put forward by the appellant in support of the first ground of appeal seek, in essence, to challenge the finding in the preceding paragraph of the present judgment that the measure at issue had to be classified as new aid, it must be held that that ground of appeal does not contain any argument seeking to demonstrate that the General Court's reasoning, set out in paragraphs 45 to 51 of the present judgment and which led to that conclusion, is vitiated by any error of law.

53 The appellant merely claims, in essence, that the measure at issue constituted existing aid, given that the decision of 27 July 2009, which recognised its right to receive the disputed compensation under Regulation No 1191/69, was a declaratory judgment of a pre-existing right based on that regulation.

54 In so far as such an assertion is not otherwise substantiated, contrary to the requirements of Article 256 TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union, Article 168(1)(d) and Article 169 of the Rules of Procedure of the Court of Justice, the first ground of appeal must be dismissed as inadmissible.

The second ground of appeal

Arguments of the parties

55 By its second ground of appeal, the appellant refers to paragraphs 121 to 136 of the judgment under appeal and claims that those paragraphs are vitiated by an error of law in that the General Court held that the Altmark conditions were not satisfied.

56 The General Court wrongly held that it was sufficient merely to determine that one of those conditions was met, namely that relating to the existence of a clearly defined PSO, without having to ascertain whether the other conditions were satisfied. It thus was wrong to confine itself to examining incidentally, in paragraph 134 of the judgment under appeal, whether the second of those conditions, relating to the prior definition of the parameters for calculating the compensation, was satisfied.

57 As regards the alleged absence of PSOs to be borne by the appellant, the General Court failed to consider that the PSO for which it is responsible has its origin in Articles 2 to 6 of the Regional Law No 9 of 26 January 1987. Moreover, the General Court's reasoning is worthy of criticism in that it read the Transport Assessor's deliberation and accepted that that decision imposed tariff obligations on the appellant, without acknowledging that the measure at issue constituted compensation for the performance of a PSO. The appellant claims, in that regard, that the fact that that decision was not produced before the Commission is the consequence of the abnormal conduct of the administrative procedure, in so far as the Region had the same decision and that the Region had no interest in producing it in the context of that procedure.

58 As regards the second Altmark condition, it was briefly examined in paragraph 134 of the judgment under appeal, by means of an incorrect reference to paragraphs 117 to 119 of that judgment. According to the appellant, in paragraph 134, the General Court incorrectly examined compliance with the condition laid down in Regulation No 1191/69 relating to the *ex ante* fixing of the compensation, not in the light of the parameters on the basis of which that compensation is calculated, as required by the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415), but in relation to the amount of the measure at issue. Furthermore, in the present case, compliance with that condition is apparent from the decision of 27 July 2009. That decision shows that the parameters for calculating the compensation had been previously defined and that the Consiglio di Stato (Council of State) merely applied them, after having found that the Region had failed to fulfil its obligations in determining that compensation.

59 Finally, although the third and fourth Altmark conditions were not examined at all in the judgment under appeal, the appellant claims that it is apparent from the decision of 7 November 2012 that those conditions were also satisfied in the present case.

60 The Commission takes the view that that ground of appeal must be dismissed as inadmissible and, in any event, as unfounded.

Findings of the Court

61 By its second ground of appeal, the appellant disputes, in essence, the grounds of the judgment under appeal, by which the General Court rejected what it considered to be the second part of the fourth and eighth pleas for annulment, relating to an error allegedly committed by the Commission which considered that two of the Altmark conditions were not satisfied.

62 In so far as the second ground of appeal relates to the Altmark conditions, it should be noted, as the General Court also pointed out in paragraph 123 of the judgment under appeal, that, according to settled case-law of the Court of Justice, Article 107(1) TFEU does not apply to State intervention 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 (judgments of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00, EU:C:2003:415, paragraph 87, and 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, paragraph 45, as well as the case-law cited).

63 Thus, a State measure which does not comply with one or more of the Altmark conditions may be regarded as State aid within the meaning of Article 107(1) TFEU (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, paragraph 48 and the case-law cited).

64 In that regard, in paragraph 125 of the judgment under appeal, the General Court rightly held that, in order for such compensation to escape classification as State aid in a particular case, the four conditions laid down in paragraphs 88 to 93 of the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415) must be satisfied (see, to that effect, 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, paragraph 46).

65 In paragraphs 129 to 131 of the judgment under appeal, the General Court confirmed, on the basis of paragraphs 106 to 114 of that judgment, the Commission's conclusion, in recital 61 of the contested decision, that the existence of a unilaterally imposed PSO had not been demonstrated and that, consequently, the first Altmark condition was not satisfied.

66 In those circumstances, the General Court was right to hold, in paragraphs 132 and 133 of the judgment under appeal, relying on the cumulative nature of the Altmark conditions, that, since the first of those conditions was not satisfied, there was no need to examine the Commission's assessment, in recital 62 of the contested decision, concerning the second Altmark condition.

67 In so far as, by its second ground of appeal, the appellant also challenges the General Court's assessments in paragraphs 106 to 114 of the judgment under appeal, on the alleged existence of a PSO which the appellant is alleged to have held to exist under national law, it must be borne in mind that, in accordance with 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 is limited to points of law. The General Court thus has exclusive jurisdiction to find and appraise the relevant facts and assess the evidence. The appraisal of those facts and the assessment of that evidence thus do not, save where the facts and evidence are distorted, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal (see judgment of 20 December 2017, *Comunidad Autónoma de Galicia and Retegal* v *Commission*, C-70/16 P, EU:C:2017:1002, paragraph 47 and the case-law cited).

68 In the present case, the Commission has not claimed and, a fortiori, has not demonstrated such distortion of national law.

69 Moreover, since the General Court has not ruled on the third and fourth Altmark conditions, the appellant's arguments alleging that those conditions were fulfilled in the present case must be rejected as inadmissible.

70 Accordingly, the second ground of appeal must be rejected as being in part inadmissible and in part unfounded.

The third ground of appeal

Arguments of the parties

71 By its third ground of appeal, the appellant submits that the General Court erred in law, in paragraphs 137 to 154 of the judgment under appeal, in finding that the contested decision was valid as regards the classification of the measure at issue as State aid within the meaning of Article 107(1) TFEU. This plea concerns, in particular, the conditions under which that classification requires the aid, first, to affect trade between Member States and, second, to distort or threaten to distort competition.

72 According to the appellant, the service market at issue is not a market open to competition. Even if there had been a gradual opening of this market to competition, there would still be no competition 'for the market' or 'in the market'. The General Court thus erred in law, in paragraph 149 of the judgment under appeal, in finding that the measure at issue entailed an obstacle to competition since undertakings, including foreign undertakings, might wish to provide their public transport services on the market, in particular on the local or regional markets, on which the appellant benefited from that measure.

73 The Commission takes the view that the plea must be dismissed as unfounded and, in any event, irrelevant.

Findings of the Court

74 The third ground of appeal seeks to call into question the General Court's assessment of the conditions that State aid, within the meaning of Article 107(1) TFEU, must, first, affect trade between Member States and, second, distort or threaten to distort competition.

75 In that regard, although the appellant refers, in general terms, to paragraphs 137 to 154 of the judgment under appeal, it claims, in essence, that the General Court's error of law, in paragraph 149 of that judgment, consists in the General Court holding therein that the measure at issue constituted an obstacle to competition, in so far as undertakings, including foreign undertakings, might wish to provide their public transport services on the Italian market, in particular local or regional markets.

76 In addition to the fact that the third ground of appeal in fact seeks to call into question factual assessments made by the General Court, which, as noted in paragraph 67 of the present judgment, are not subject to review by the Court of Justice in the absence of any distortion, it must be held that that ground of appeal is, in any event, ineffective in so far as it relates solely to paragraph 149 of the judgment under appeal.

77 In paragraph 148 of the judgment under appeal, the General Court held that the factors which the Commission had taken into account in its assessment, in recitals 66 to 68 of the contested decision, were such as to show that granting the measure at issue was liable to affect trade between Member States and distort competition.

78 In that context, the General Court relied not only on the finding in paragraph 149 of the judgment under appeal, which is criticised by the appellant, but on two other findings, set out in paragraphs 150 and 151 of that judgment, which are not in essence disputed by the appellant.

79 In paragraph 150 of that judgment, the General Court observed, first, that the domestic activity of the Member State concerned could be maintained or increased as a result of the measure at issue, with the result that the opportunities for undertakings established in other Member States to enter the market in question may be reduced. In paragraph 151 of that judgment, the General Court stated that the fact that the appellant was also in competition with undertakings from other Member States also on other markets, on which it was active, was a factor of such a kind as to show that the grant of the aid which was the subject of the measure at issue was capable of affecting trade between Member States.

80 In those circumstances, the third ground of appeal must be rejected as inadmissible and, in any event, as ineffective.

The fourth ground of appeal

Arguments of the parties

81 By its fourth ground of appeal, the appellant submits that the General Court made several errors of law in paragraphs 155 to 195 of the judgment under appeal. That ground of appeal consists of three parts.

82 By the first part, the appellant claims that the General Court erred in law in finding that the Commission had exclusive competence to assess the compatibility of the measure at issue with the internal market, whereas the Consiglio di Stato (Council of State) issued a decision which has the force of *res judicata* with regard to that measure.

83 In that regard, the Court's case-law cited in paragraphs 185, 186 and 188 of the judgment under appeal is irrelevant, since it concerns situations in which there was a Commission decision prior to national legal proceedings. It follows from that that there was an error of law also in paragraph 190 of the judgment under appeal, in that the General Court held that the principle of *res judicata* could not prevent the Commission from finding the existence of unlawful State aid, even if that characterisation had been previously rejected by a national court adjudicating at last instance. Such an approach cannot, according to the appellant, be inferred from the case-law of the Court of Justice and the judgment under appeal contains no reasoning on that point.

84 In the present case, the Consiglio di Stato (Council of State) did not adopt a decision contrary to a prior Commission decision. It ruled independently before the Commission, by directly applying Regulation No 1191/69 and categorising the measure at issue as compensation for tariff PSOs, which enabled it to rule out the categorisation of that measure as State aid. The possible intervention of the EU institutions, in the present case the Commission, could have taken the form of a question referred to the Court of Justice for a preliminary ruling, but the Consiglio di Stato (Council of State) did not consider it necessary to refer such a question to the Court of Justice. In contrast, the Commission was involved unlawfully, given that the compatibility of that measure with EU law was the subject of a decision having the force of *res judicata* at national level.

85 By the second part of the fourth ground of appeal, the appellant raises a 'procedural anomaly' in that the notification to the Commission of the measure at issue by the Region was carried out with a view to obtaining a negative decision from the Commission, which explains why that region provided only fragmentary information to the Commission as regards that measure. The Commission thus infringed the procedural framework to which it is subject, as it results from Regulation No 659/1999 and from Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of

Article 108 of the Treaty on the Functioning of the European Union (OJ 2015 L 248, p. 9). The Region was wrongly regarded as an 'interested party' within the meaning of Article 24 of Regulation 2015/1589 and not as the notifier to the Commission. The General Court thus failed to find that the contested decision was unlawful on account of such an irregularity. Furthermore, those regulations were unlawfully applied, which infringed the rights of the defence.

86 By the third part of the fourth ground of appeal, the appellant submits that the recognition by the General Court of the Commission's power to rule on a measure which had been the subject of a decision of a national court having the force of *res judicata* also infringes the principle of the protection of legitimate expectations in so far as, in the present case, more than five years elapsed between the time when that national decision was adopted and the time when the Commission adopted its decision. Such a period has already been taken into account in the case-law of the Court of Justice for the purposes of assessing a situation in the light of that principle. In paragraph 192 of the judgment under appeal, the General Court held, on the basis of the judgment of 13 June 2013, *HGA and Others* v *Commission* (C-630/11 P to C-633/11 P, EU:C:2013:387, paragraph 134), that legitimate expectations may be relied upon only if the obligation to notify has been complied with. The General Court failed to have regard to the fact that, in the present case, that notification was not necessary since, contrary to what the General Court held, the measure at issue does not constitute new aid. Furthermore, a link may be established between the principle of *res judicata* and the principle of legal certainty, which constitutes a limit on the obligation to recover, as is apparent from Article 14 of Regulation No 659/1999. Furthermore, the appellant could, in its view, base a legitimate expectation on the fact that the Consiglio di Stato (Council of State) had not considered it necessary to refer a question to the Court of Justice for a preliminary ruling with regard to the measure at issue. In those circumstances, the appellant takes the view that it was entitled to rely on the legality of that measure, since all legal remedies had been exhausted.

87 The Commission contends that that ground of appeal must be rejected, in part, as inadmissible and, in part, as unfounded.

Findings of the Court

88 By its fourth ground of appeal, the three parts of which should be examined together, the appellant submits, in essence, that the General Court committed several errors of law in rejecting the first, fifth and sixth pleas for annulment, which related to the Commission's lack of competence to adopt the contested decision, in so far as that decision was, in its view, directed against a decision of a national court which had the force of *res judicata*.

89 In that regard, in paragraphs 184 to 188 of the judgment under appeal, the General Court correctly pointed out that the application of the rules on State aid is based on an obligation of sincere cooperation between, on the one hand, the national courts, and, on the other, the Commission and the EU Courts, in the context of which each acts on the basis of the role assigned to it by the FEU Treaty.

90 Accordingly, in paragraph 185 of the judgment under appeal, the General Court rightly pointed out, in that regard, on the basis of the case-law of the Court of Justice, that proceedings may be brought before national courts in matters relating to State aid which require them to interpret and apply the concept of aid referred to in Article 107(1) TFEU, in particular with a view to determining whether a State measure has been introduced in infringement of Article 108(3) TFEU. In contrast, national courts do not have jurisdiction to give a decision on whether State aid is compatible with the internal market. The assessment of the compatibility of aid measures or an aid scheme with the internal market falls, in fact, within the exclusive competence of the Commission, subject to review by the EU courts (see, to that effect, judgments of 18 July 2007, *Lucchini*, C-119/05, EU:C:2007:434, paragraphs 50 to 52, and of 15 September 2016, *PGE*, C-574/14, EU:C:2016:686, paragraphs 30 to 32).

91 As the General Court correctly held, in paragraph 186 of the judgment under appeal, that case-law implies that national courts must refrain, in particular, from taking decisions running counter to a Commission decision.

92 However, contrary to the appellant's claim, in the converse situation, in which there was a decision of a national court relating to a State measure prior to the Commission decision, it also follows from that case-law that that fact cannot prevent the Commission from exercising the exclusive jurisdiction conferred on it by the FEU Treaty as regards the assessment of the compatibility of aid measures with the internal market.

93 The exercise of such a power implies that the Commission may examine, pursuant to Article 108 TFEU, whether a measure constitutes State aid which should have been notified to it, in accordance with paragraph 3 of that article, in a situation where the authorities of a Member State have taken the view that that measure did not satisfy the conditions laid down in Article 107(1) TFEU, including where those authorities have complied, in that regard, with the assessment of a national court.

94 That conclusion cannot be invalidated by the fact that that court has adopted a decision having the force of *res judicata*. It should be emphasised that the rule of exclusive competence of the Commission is necessary in the internal legal order as a consequence of the principle of the primacy of Union law (see, to that effect, judgment of 18 July 2007, *Lucchini*, C-119/05, EU:C:2007:434, paragraph 62).

95 Thus, as the General Court correctly pointed out in paragraph 188 of the judgment under appeal, on the basis of the exclusive competence of the Commission, EU law precludes the application of the principle of *res judicata* from preventing the recovery of State aid granted in infringement of that law, the incompatibility of which has been established by a Commission decision which has become final (see, to that effect, judgment of 18 July 2007, *Lucchini*, C-119/05, EU:C:2007:434, paragraph 63).

96 Similarly, the General Court was right to hold, in paragraph 190 of the judgment under appeal, that the application of the principle of *res judicata* cannot prevent the Commission from finding the existence of unlawful State aid, even if such a categorisation had been previously ruled out by a national court adjudicating at last instance.

97 Therefore, the General Court did not err in law in finding, in paragraph 190 of the judgment under appeal, that the Commission had the power to examine the measure at issue pursuant to Article 108 TFEU, since, as is apparent from paragraph 189 of that judgment, it constituted unlawful aid, even though that measure had been the subject of a decision of the Consiglio di Stato (Council of State).

98 That conclusion is not called into question by the appellant's argument alleging infringement of the principle of the protection of legitimate expectations.

99 It must be recalled that the right to rely on that principle extends to any person whom an institution of the European Union, by giving him or her precise assurances, has led him or her to entertain well-founded expectations (judgments of 16 December 2010, *Kahla Thüringen Porzellan* v *Commission*, C-537/08 P, EU:C:2010:769, paragraph 63, and of 13 June 2013, *HGA and Others* v *Commission*, C-630/11 P to C-633/11 P, EU:C:2013:387, paragraph 132 and the case-law cited).

100 In the light of that case-law, from which follows that on which the General Court relied in paragraph 192 of the judgment under appeal, the appellant cannot claim that the decision of the Consiglio di Stato (Council of State) led it to entertain reasonable expectations as a basis for opposing the exercise by the Commission of its exclusive competence, as recognised by the case-law of the Court of Justice referred to in paragraph 90 of the present judgment.

101 Finally, the appellant's argument claiming a 'procedural anomaly' affecting the legality of the contested decision must be declared inadmissible, given that the appellant does not identify any ground of the judgment under appeal which it specifically criticises.

102 Consequently, the fourth ground of appeal must be dismissed as being in part inadmissible and in part unfounded.

The fifth ground of appeal

Arguments of the parties

103 By its fifth ground of appeal, the appellant submits that the General Court erred in law in finding that Regulation No 1370/2007 was applicable *ratione temporis* and *ratione materiae* for the purposes of assessing the compatibility of the measure at issue with the internal market. As regards the application *ratione temporis* of that regulation, the General Court wrongly held, in paragraph 216 of the judgment under appeal, that the relevant criterion was the date on which the measure was implemented or the aid paid, which, in the present case, is a date subsequent to the entry into force of that regulation. Paragraph 220 of the judgment under appeal is vitiated by a failure to state reasons as regards the substantive application of that regulation in the present case.

104 According to the appellant, there is no doubt that Regulation No 1370/2007 is inapplicable in the present case, since that regulation refers exclusively to 'public service contracts', which must, in accordance with Article 5(1) and (3) of that regulation, be awarded by means of a call for tenders. However, the contracts at issue were not the subject of any call for tenders and are not covered by any exception to the competitive tendering rule laid down by that regulation.

105 The Commission contends that the first ground of appeal must be dismissed as being unfounded.

Findings of the Court

106 By its fifth ground of appeal, the appellant submits that the General Court committed several errors of law in rejecting its third plea for annulment, by which it challenged the Commission's choice, in recital 92 of the contested decision, to examine the compatibility of the measure at issue in the light of Regulation No 1370/2007, which entered into force on 3 December 2009 and repealed Regulation No 1191/69.

107 In so far as the appellant argued before the General Court that, as regards the date of implementation of the measure at issue, the Commission should have taken into account the date of the decision of 27 July 2009 and not that of the decision of 7 November 2012, the General Court pointed out, in paragraph 216 of the judgment under appeal, that, in accordance with the case-law of the Court of Justice, the criterion to be taken into account for assessing the compatibility of aid is the date on which that measure was implemented or the aid paid, in this case 21 December 2012.

108 While it is true that, by its fifth ground of appeal, the appellant takes the view that paragraph 216 is vitiated by an error of law, it does not, however, indicate in any way what that error consists of, with the result that its argument must be dismissed as inadmissible.

109 Next, as regards the appellant's head of claim that the judgment under appeal is vitiated by a failure to state reasons as regards the application *ratione materiae* of Regulation No 1370/2007, it should be noted that that claim is based on an incomplete reading of the judgment under appeal.

110 It is apparent from paragraphs 208 and 209 of the judgment under appeal that the General Court responded to the appellant's argument that Regulation No 1370/2007 was not applicable to the examination of the compatibility of the measure at issue, since that regulation was based on the concept of a public service contract and, in the present case, no contract had been concluded by the Region. The General Court stated, in that regard, that that question had already been examined by the Court of Justice in the judgment of 6 October 2015, *Commission* v *Andersen* (C-303/13 P, EU:C:2015:647), and that the parties had had the opportunity to express their views on the conclusions to be drawn from that judgment in response to a written question put by the General Court, and at the hearing, which the appellant does not dispute in its appeal.

111 Furthermore, in paragraph 220 of the judgment under appeal, the General Court rejected the appellant's arguments relating to the 'illogical and irrational application of Regulation No 1370/2007' to a situation in which a public service contract had not been concluded but the PSOs originated in a concession scheme, by referring to the preceding paragraphs of that judgment, in which the General Court found that the Commission had correctly applied the rules laid down in that regulation.

112 It follows from the above that paragraph 220 of the judgment under appeal, read in light of paragraphs 208 and 209 thereof, is likely to enable both the appellant to know the reasons for the General Court's arguments and for the Court of Justice to have sufficient evidence to exercise its judicial review in the context of an appeal, so that it complies with the requirements of the Court of Justice's settled case-law in this matter (see, to that effect, 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, paragraph 81 and the case-law cited).

113 The appellant's claim alleging infringement of the obligation to state reasons must therefore be rejected as unfounded.

114 Lastly, the appellant's argument that Regulation No 1370/2007 is not applicable *ratione materiae* to the present case must also be rejected. Since the appellant has failed to indicate the paragraph of the judgment under appeal which it seeks to challenge and to identify any error of law that the General Court may have committed in that regard, that argument is inadmissible.

115 Thus, the fifth ground of appeal must be rejected as being in part inadmissible and being in part unfounded.

116 Since none of the grounds relied on by the appellant in support of its appeal has been upheld, that appeal must be dismissed in its entirety.

Costs

117 In accordance with the Article 184(2) of the Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to costs. Under Article 138(1) of the Rules of Procedure, which applies to appeal proceedings pursuant to 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. Since the Commission has applied for costs and the appellant has been unsuccessful, the appellant must be ordered to pay the costs.

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

1. **Dismisses the appeal.**

2. **Orders Buonotourist Srl to pay the costs.**

[Signatures]