



ОБЩ СЪД НА ЕВРОПЕЙСКИЯ СЪЮЗ
TRIBUNAL GENERAL DE LA UNIÓN EUROPEA
TRIBUNÁL EVROPSKÉ UNIE
DEN EUROPÆISKE UNIONS RET
GERICHT DER EUROPÄISCHEN UNION
EUROOPA LIIDU ÜLDKOHUS
ΓΕΝΙΚΟ ΔΙΚΑΣΤΗΡΙΟ ΤΗΣ ΕΥΡΩΠΑΪΚΗΣ ΕΝΩΣΗΣ
GENERAL COURT OF THE EUROPEAN UNION
TRIBUNAL DE L'UNION EUROPÉENNE
CÚIRT GHINEARÁLTA AN AONTAIS EORPAIGH
TRIBUNALE DELL'UNIONE EUROPEA
EIROPAS SAVIENĪBAS VISPĀRĒJĀ TIESA

EUROPOS SĄJUNGOS BENDRASIS TEISMAS
AZ EURÓPAI UNIÓ TÖRVÉNYSZÉKE
IL-QORTI ĠENERALI TAL-UNJONI EWROPEA
GERECHT VAN DE EUROPESE UNIE
SĄD UNII EUROPEJSKIEJ
TRIBUNAL GERAL DA UNIÃO EUROPEIA
TRIBUNALUL UNIUNII EUROPENE
VŠEOBECNÝ SÚD EURÓPSKEJ ÚNIE
SPLOŠNO SODIŠČE EVROPSKE UNIJE
EUROOPAN UNIONIN YLEINEN TUOMIOISTUIN
EUROPEISKA UNIONENS TRIBUNAL

JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

20 March 2013 *

(State aid – Aid granted by the Danish authorities to the public undertaking DSB – Public service contracts for the supply of passenger rail transport services between Copenhagen and Ystad – Decision declaring the aid compatible with the internal market subject to conditions – Temporal application of rules of substantive law)

In Case T-92/11,

Jørgen Andersen, residing in Ballerup (Denmark), represented by M. Nissen, G. van de Walle de Ghelcke and J. Rivas Andrés, lawyers,

applicant,

v

European Commission, represented by T. Maxian Rusche and L. Armati, acting as Agents,

defendant,

supported by

Kingdom of Denmark, represented by C. Vang, acting as Agent, assisted by K. Lundgaard Hansen and R. Holdgaard, lawyers,

and by

Danske Statsbaner (DSB), established in Copenhagen (Denmark), represented by S. Kalsmose-Hjelmberg and M. Honoré, lawyers,

interveners,

APPLICATION for partial annulment of Commission Decision 2011/3/EU of 24 February 2010 concerning public transport service contracts between the

* Language of the case: English.

Danish Ministry of Transport and Danske Statsbaner (Case C 41/08 (ex NN 35/08)) (OJ 2011 L 7, p. 1),

THE GENERAL COURT (Fifth Chamber),

composed of S. Papasavvas (Rapporteur), President, V. Vadapalas and K. O'Higgins, Judges,

Registrar: N. Rosner, Administrator,

having regard to the written procedure and further to the hearing on 13 December 2012,

gives the following

Judgment

Background to the dispute

- 1 The applicant, Mr Jørgen Andersen, carries out, under the trade name of Gråhundbus v/Jørgen Andersen, bus transport services in Denmark and abroad. He operates, in particular, a route between Copenhagen (Denmark) and Ystad (Sweden). Ystad is connected by ferry to the island of Bornholm (Denmark).

Measures at issue

- 2 Danske Statsbaner (DSB) is the incumbent rail transport operator in Denmark. At the time of the facts at issue, DSB was wholly-owned by the Danish State and operated railway passenger transport and connected services only.
- 3 Since the abolition of DSB's monopoly on 1 January 2000, there have been two systems for the provision of passenger rail transport services in Denmark: the free traffic system, operated on a commercial basis, and the public service traffic system, governed by public service contracts that may provide for compensation for the routes operated.
- 4 During the period 2000-2004, DSB was awarded a public transport service contract concerning long-distance and regional lines. From 15 December 2002, that contract also covered the route between Copenhagen and Ystad, which had previously been subject to a free traffic system.
- 5 For the period 2005-2014, DSB has been awarded a new public transport service contract concerning long-distance and regional lines as well as the international routes with Germany and the route between Copenhagen and Ystad.

The contested decision

- 6 Following two complaints, one of which was made by the applicant, concerning the public service contracts awarded to DSB, the Commission of the European Communities decided, on 10 September 2008, to initiate the formal investigation procedure laid down in Article 88(2) EC.
- 7 At the end of that procedure, the Commission adopted, on 24 February 2010, Decision 2011/3/EU concerning public transport service contracts between the Danish Ministry of Transport and Danske Statsbaner (Case C 41/08 (ex NN 35/08)) (OJ 2011 L 7, p. 1) ('the contested decision').
- 8 Article 1 of the contested decision reads:

‘Article 1

The public transport service contracts concluded between the Danish Ministry of Transport and Danske Statsbaner constitute State aid within the meaning of Article 107(1) [TFEU].

The State aid is compatible with the internal market pursuant to Article 93 [TFEU] in so far as the conditions of Articles 2 and 3 of this Decision are complied with.’

Procedure and forms of order sought

- 9 By application lodged at the Registry of the General Court on 18 February 2011, the applicant brought the present action.
- 10 By documents lodged at the Court Registry on 23 May 2011, the Kingdom of Denmark and DSB sought leave to intervene in the present case in support of the form of order sought by the Commission, in accordance with Article 115 of the Rules of Procedure of the General Court.
- 11 By orders of 22 June 2011, the President of the Fifth Chamber of the General Court granted the applications for leave to intervene.
- 12 The Kingdom of Denmark and DSB lodged their statements in intervention on 8 September 2011.
- 13 The Commission and the applicant lodged their observations on the statements in intervention on 25 and 28 November 2011 respectively.
- 14 On hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure.

- 15 At the hearing, which took place on 13 December 2012, the parties presented oral argument and replied to the questions put by the Court.
- 16 The applicant claims that the Court should:
 - annul the second paragraph of Article 1 of the contested decision;
 - order the Commission to pay the costs;
 - order the Kingdom of Denmark and DSB to bear their own costs;
 - order the Kingdom of Denmark or DSB to pay the costs it incurred to reply to their respective statements in intervention.
- 17 The Commission contends that the Court should:
 - dismiss the action;
 - order the applicant to pay the costs.
- 18 The Kingdom of Denmark and DSB support the form of order sought by the Commission.

Law

- 19 In support of the action, the applicant puts forward three pleas in law.
- 20 The first plea alleges an error of law in that the Commission considered that the Danish Government did not commit a manifest error of assessment in classifying the Copenhagen-Ystad route as a public service and including it in the scheme of public service contracts.
- 21 The second plea alleges an error of law in that the Commission did not order recovery of the incompatible overcompensation resulting from the dividends paid by DSB to its shareholder, the Danish State.
- 22 The third plea alleges an error of law in that the Commission applied 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) No 1191/69 and No 1107/70 (OJ 2007 L 315, p. 1), instead 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, Series I Chapter 1969(I), p. 276).
- 23 The Court considers it appropriate to examine the third plea first.

- 24 By that plea, the applicant submits that the Commission erred in law by basing its assessment of the compatibility of the aid referred to in the contested decision on the regulation in force when that decision was adopted, namely Regulation No 1370/2007. Firstly, the applicant submits that, as the contested decision concerns non-notified aid, the Commission should have applied the substantive rules in force at the time when that aid was paid, namely Regulation No 1191/69. According to him, Regulation No 1370/2007 could not be applied retroactively as the conditions for retroactive application were not satisfied. Secondly, considering that it is not the task of the General Court to verify whether the Commission would have reached the same decision under a different legal basis, the applicant submits that the Commission's argument that applying Regulation No 1191/69 would lead to the same result is ineffective. In any event, he claims that the application of Regulation No 1191/69 would not have resulted in the same outcome as that resulting from the regulation actually applied, and that the contested decision is not sufficiently reasoned in that regard.
- 25 The Commission argues, firstly, that the recipient of non-notified aid is in a temporary situation and that, therefore, according to the case-law, the compatibility of such aid must be assessed on the basis of the substantive rules in force at the time when the Commission adopts its decision, namely, in the present case, on the basis of Regulation No 1370/2007. Secondly, it contends that in any event Regulation No 1370/2007, by virtue of its objective and general scheme, has retroactive effect and applies to non-notified aid paid before it came into force. Thirdly, it contends that it could not assess the compatibility of the aid in question on the basis of Regulation No 1191/69, as that regulation was no longer in force when the contested decision was adopted. Fourthly, it disputes the applicant's arguments seeking to question its assessment that the application of Regulation No 1191/69 would have resulted in the same outcome as the application of Regulation No 1370/2007, and asserts that the contested decision is sufficiently reasoned in that regard. Finally, the arguments concerning that latter question are not ineffective, since it assessed the compatibility of the aid in question in the contested decision also on the basis of Regulation No 1191/69.
- 26 The Kingdom of Denmark supports the Commission's argument. Furthermore, it asserts that any error in the choice of the legal basis in the present case has no effect on the legality of the contested decision, because the substantive requirements under Regulation No 1191/69 are less stringent than or equivalent to the requirements under Regulation No 1370/2007. The Commission therefore could have reached exactly the same decision under Regulation No 1191/69.
- 27 DSB supports the Commission's arguments that the application of Regulation No 1191/69 could not have led to a different conclusion and, moreover, that the contested decision is sufficiently reasoned in that regard. It adds that, even if Regulation No 1191/69 were applied, no notification obligation would exist with regard to the measures in question. However, DSB contests the approach of the

Commission according to which rules developed in fields other than transport are applicable to public service contracts governed by Regulation No 1191/69.

- 28 In the present case, it is necessary, first of all, to rule on DSB's argument that the applicant does not have an interest in requesting the annulment of the contested decision in so far as it relates to all of the public service contracts concluded with the Kingdom of Denmark as from 2000 because, in its view, firstly, the applicant is its competitor only as regards the Copenhagen-Ystad route and, secondly, that route was included in the public service contract for the period 2000 to 2004 only as of 15 December 2002. DSB concludes from that that the applicant has an interest in requesting the annulment of the contested decision only in so far as it concerns the Copenhagen-Ystad route with effect from 15 December 2002.
- 29 It must be borne in mind that, according to settled case-law, an action for annulment brought by a natural or legal person is not admissible unless the applicant has an interest in seeing the contested measure annulled. That interest must be vested and present and is evaluated as at the date on which the action is brought (see Case T-354/05 *TF1 v Commission* [2009] ECR II-471, paragraph 84 and the case-law cited).
- 30 Such an interest presupposes that the annulment of the measure must of itself be capable of having legal consequences or, in other words, the action must be liable, if successful, to procure an advantage for the party who has brought it (see Case T-310/00 *MCI v Commission* [2004] ECR II-3253, paragraph 44 and the case-law cited).
- 31 In the present case, it must be pointed out that, according to the fourth paragraph of Article 40 of the Statute of the Court of Justice of the European Union, applicable to the General Court by virtue of Article 53 thereof, an application to intervene is limited to supporting the form of order sought by one of the principal parties. Furthermore, according to Article 116(3) of the Rules of Procedure of the General Court, the intervener must accept the case as he finds it at the time of his intervention. Consequently, although those provisions do not preclude the intervener from advancing arguments which are new or differ from those of the party which he supports, those arguments must not alter the framework of the dispute (Case C-245/92 P *Chemie Linz v Commission* [1999] ECR I-4643, paragraph 32; Case T-459/93 *Siemens v Commission* [1995] ECR II-1675, paragraph 21; and Case T-37/97 *Forges de Clabecq v Commission* [1999] ECR II-859, paragraph 92). It follows that DSB had no standing to put forward the objection of inadmissibility alleging that the applicant has no legal interest in bringing proceedings and the Court is not therefore required to examine it.
- 32 In any event, that plea cannot succeed. Firstly, it is common case that the applicant operates a service which is in competition with that of DSB on the Copenhagen-Ystad route and, secondly, that that route was included in the public service contract covering the period from 2000 to 2004 as from 15 December

2002. None the less, although DSB disputes the applicant's legal interest in bringing proceedings as regards the other lines included in the public service contracts at issue and, as regards the Copenhagen-Ystad route, in respect of the period prior to 15 December 2002, the fact remains that, in respect of each contract, the amount of the contractual payments paid by the Kingdom of Denmark to DSB depends inter alia on DSB's revenue and on the costs borne by DSB on all the transport lines and over the whole of the period covered by the contract. Therefore, it is not apparent from the contested decision that the clauses whose annulment the applicant has, according to DSB, an interest in requesting to have annulled are separable from the other clauses of the contracts at issue with the result that the applicant could have requested, and obtained, their annulment in part. Consequently, it must be held that the applicant has an interest in requesting the annulment of the second paragraph of Article 1 of the contested decision in so far as it concerns all the public service contracts covered by that decision.

- 33 Secondly, it is necessary to rule on the applicant's argument that the Commission erred in assessing the compatibility of the aid at issue on the basis of Regulation No 1370/2007, which was in force at the time when the contested decision was adopted.
- 34 In that regard, it must be borne in mind that, although procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, that is not the case with substantive rules (Joined Cases 212/80 to 217/80 *Meridionale industria salumi* [1981] ECR 2735, paragraph 9).
- 35 Accordingly, in order to ensure observance of the principles of legal certainty and the protection of legitimate expectations, the substantive rules of Community law must be interpreted as applying to situations existing before their entry into force only in so far as it clearly follows from their terms, objectives or general scheme that such effect must be given to them (Case 234/83 *Gesamthochschule Duisburg* [1985] ECR 327, paragraph 20; Case C-34/92 *GruSa Fleisch* [1993] ECR I-4147, paragraph 22; and Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano v Commission* [2002] ECR I-17869, paragraph 119).
- 36 On the other hand, European Union legislation applies immediately to the future effects of a situation which arose under the old law (Case 270/84 *Licata v ESC* [1986] ECR 2305, paragraph 31, and Case C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049, paragraph 50).
- 37 In the present case, it is not disputed that the Commission's competence to adopt the contested decision derives from Article 88 EC. Therefore, the issue raised in the present case does not concern the applicability of procedural rules, but the applicability of rules of substantive law.
- 38 In this respect, as regards the substantive rules applicable in assessing the compatibility of aid with the internal market, a distinction should be drawn

between aid which has been notified but not paid and aid which has been paid without notification.

- 39 Firstly, with regard to aid which has been notified but not paid, under the European Union system for the review of State aid, the date on which the effects of the planned aid occur is the same as that on which the Commission adopts the decision ruling on the compatibility of that aid with the common market. The rules, principles and criteria for assessing the compatibility of State aid which are in force at the date on which the Commission takes its decision may generally be regarded as those best adapted to the conditions of competition (Case C-334/07 P *Commission v Freistaat Sachsen* [2008] ECR I-9465, paragraphs 50 to 53). That is because the aid in question would not create real advantages or disadvantages in the common market until, at the earliest, the date on which the Commission decides whether or not to authorise it (Case T-3/09 *Italy v Commission* [2011] ECR II-95, paragraph 60).
- 40 Secondly, as regards aid which has been paid without being notified, the applicable substantive rules are those in force at the time when the aid was paid, since the advantages and disadvantages created by such aid arose during the period in which that aid was paid (Case T-348/04 *SIDE v Commission* [2008] ECR II-625, paragraphs 58 to 60, and *Italy v Commission*, paragraph 61).
- 41 In the present case, it is common case that the measures at issue were paid without notification to the Commission prior to their implementation. Furthermore, it is apparent from the contested decision that those measures constitute aid within the meaning of Article 87 EC. Indeed, the Commission reiterated that assessment in the written pleadings produced before the Court. On the latter point, the Kingdom of Denmark and DSB submit that there was no obligation to notify the disputed public service contracts. In that regard, it is apparent from the case-law that the fourth paragraph of Article 40 of the Statute of the Court of Justice and Article 116(3) of the Rules of Procedure of the General Court do not preclude the intervener from advancing arguments which are new or differ from those of the party which he supports as long as those arguments do not alter the framework of the dispute (see the case-law cited in paragraph 31 above). It is common case that, in the framework of the present dispute, the question brought before the Commission and then the Court was whether the public transport service contracts concluded between the Kingdom of Denmark and DSB were compatible with the rules of European Union law concerning State aid and not whether those contracts should have been notified. The interveners' line of argument relating to that latter point is therefore inadmissible.
- 42 Consequently, it must be held that the present case is one of the cases referred to in paragraph 40 above in which aid was paid without being notified.
- 43 The compatibility of the aid in question with the internal market should therefore, in principle, be assessed on the basis of the substantive rules in force at the time

when it was paid, unless the exceptional conditions for retroactive application are satisfied.

- 44 It must be pointed out that both of the public service contracts concluded, the first in respect of the period 2000-2004, and the second in respect of the period 2005-2014, and categorised as State aid in the contested decision, have already been implemented for those two periods respectively. Consequently, it must be held that the State aid in question was granted under Regulation No 1191/69, the provisions of which were, in principle, applicable until it was repealed by Regulation No 1370/2007 on 3 December 2009.
- 45 Moreover, there is no provision in Regulation No 1370/2007 which confers a retroactive effect on that regulation. On that point, the Commission submits, by an interpretation *a contrario* of Article 8(3) of Regulation No 1370/2007, which relates to the transitional provisions applicable to public service contracts concluded prior to the entry into force of that regulation, that the provisions of that regulation, with the exception of those in Article 8(2), apply retroactively. In that regard, it must be borne in mind that the new rules may be applied retroactively only in so far as it clearly follows from their terms, objectives or general scheme that such effect must be given to them (see the case-law cited in paragraph 35 above). In the present case, it does not clearly follow from any provision of Regulation No 1370/2007 that it may apply retroactively. Accordingly, the Commission's interpretation *a contrario* of Article 8(3) of Regulation No 1370/2007 does not permit the inference that the requirements of the case-law for the attribution of retroactive effect to a measure have been satisfied. Consequently, contrary to what the Commission maintains, that regulation cannot be regarded as having retroactive effect.
- 46 Therefore, in accordance with the case-law, since Regulation No 1370/2007 has no retroactive effect, the compatibility of the aid in question with the internal market should have been assessed under the substantive rules in force at the time when it was paid, namely under Regulation No 1191/69.
- 47 It is common ground that, in the present case, the compatibility of the aid in question was assessed on the basis of Regulation No 1370/2007. The Commission therefore carried out its assessment of the compatibility of the aid in question with the internal market on an incorrect legal basis.
- 48 In the light of the foregoing, it must be held that the Commission erred in law in applying Regulation No 1370/2007 when assessing the compatibility of the aid in question with the internal market.
- 49 That finding is not called in question by the Commission's arguments.
- 50 Firstly, as regards the Commission's argument that it assessed the compatibility of the aid in question simultaneously on the basis of Regulation No 1191/69 and of Regulation No 1370/2007, it must be pointed out that recital 398 of the contested

decision, to which the Commission refers to substantiate its argument, merely states that the assessment rules in Regulation No 1370/2007 are substantially similar to those in Regulation No 1191/69 and that the application of the latter would not have led to a different conclusion. As has already been stated (see paragraph 47 above), it is unequivocally clear from the contested decision that the assessment of the aid in question was carried out solely on the basis of Regulation No 1370/2007. Consequently, a mere reference to Regulation No 1191/69 in recital 398 of the contested decision, without actually applying it to assess the compatibility of the aid in question, is not sufficient to prove that the Commission simultaneously applied both of those regulations to this specific case. That argument on the part of the Commission is therefore unfounded.

- 51 Secondly, as regards the Commission's argument that it could not base its assessment of the compatibility of the aid in question on Regulation No 1191/69 because that regulation was no longer in force when the contested decision was adopted, it must be stated that that argument is contradicted by the case-law according to which, as regards aid which has been paid without being notified, the applicable rules of substantive law are those in force at the time when the aid was paid (see paragraphs 34 to 36 above). That argument is therefore unfounded.
- 52 Thirdly, as regards the Commission's line of argument that the substantive rules applicable to State aid, with the exception of existing aid, are those in force at the time when the decision on their compatibility was adopted, without distinction between aid which has been notified but not paid and aid which has been paid without being notified, it is contrary to the case-law and is not capable of casting doubt on the Court's assessment.
- 53 The Commission bases its argument on *Commission v Freistaat Sachsen* and on the judgment of 9 June 2011 in Joined Cases C-465/09 P to C-470/09 P *Diputación Foral de Vizcaya and Others v Commission*, not published in the ECR. Furthermore, the Commission relied, at the hearing, on the orders of the Court of Justice of 22 March 2012 in Case C-167/11 P *Cantiere navale De Poli v Commission*, not published in the ECR, and Case C-200/11 P *Italy v Commission*, not published in the ECR.
- 54 As regards the judgment in *Commission v Freistaat Sachsen* and the orders in *Cantiere navale De Poli v Commission* and *Italy v Commission*, it must be pointed out that they relate to the application of substantive rules to aid which was notified but not paid. In the present case, the measures at issue were not notified. As is apparent from the case-law (see paragraphs 39 and 40 above), there is a difference between aid which has been notified but not paid and aid which has been paid without being notified with regard to the choice of the applicable rules for assessing their compatibility with the internal market. Consequently, the principles set out in *Commission v Freistaat Sachsen* and in the orders in *Cantiere navale De Poli v Commission* and *Italy v Commission* are not capable of being applied to the present case.

- 55 Moreover, as regards the judgment in *Diputación Foral de Vizcaya and Others v Commission*, it must be pointed out that, even though it concerns aid which was paid without being notified, it is not capable of being applied to the present case. It must be borne in mind that the issue raised in the present case concerns the temporal applicability of the rules of law which constitute the legal basis for assessing the compatibility of State aid. By contrast, the judgment in *Diputación Foral de Vizcaya and Others v Commission* concerned an issue of legal certainty and related to the applicability of guidelines, which, as the Court of Justice stated in paragraph 120 of that judgment, cannot be categorised as rules of law. Furthermore, those guidelines contained an express clause concerning the conditions of their temporal application, which stated that they had a retroactive effect with regard to aid which was paid without being notified. The Court of Justice's statement in paragraph 127 of that judgment must therefore be understood as meaning that Member States cannot expect that new rules can never apply to aid which has been paid without being notified. The fact remains that, contrary to the Commission's claims, that statement by the Court of Justice does not cast doubt on the case-law already cited (see paragraph 40 above) according to which the substantive rules applicable to aid which has been paid without notification are those in force at the time when the aid was paid, unless the exceptional conditions for retroactive application are satisfied. As the guidelines concerned in the case which gave rise to the judgment in *Diputación Foral de Vizcaya and Others v Commission* made express provision for retroactivity, the Court's finding that a Member State could not invoke the principle of legal certainty to prevent the application of those retroactive rules must be viewed in that specific context. In the present case, as Regulation No 1370/2007 may not be applied retroactively (see paragraph 45 above), the principles set out in the judgment in *Diputación Foral de Vizcaya and Others v Commission* are not capable of being applied to this case.
- 56 Consequently, the principles deriving from the case-law referred to in paragraphs 34 to 36 above on which the Court relied in assessing the appropriate legal basis in the present case are not called in question by the case-law relied on by the Commission. The arguments which the Commission derives from it are therefore unfounded.
- 57 Accordingly, as none of those arguments is capable of calling in question the Court's finding that the Commission erred in law by applying Regulation No 1370/2007 in assessing the compatibility of the aid in question with the internal market, the third plea must be upheld.
- 58 Lastly, as regards the consequences of that error of law on the part of the Commission, it is settled case-law that, in the application of Article 87 EC, the Commission has a wide discretion, the exercise of which involves complex economic and social assessments (see, to that effect, Case 310/85 *Deufil v Commission* [1987] ECR 901, paragraph 18, and Case C-372/97 *Italy v Commission* [2004] ECR I-3679, paragraph 83). The Court may not therefore

substitute its own assessment for that of the Commission or decide whether aid is compatible with the internal market (see, to that effect, Case C-169/95 *Spain v Commission* [1997] ECR I-135, paragraph 34). In those circumstances, it is necessary to reject the arguments of the Commission, the Kingdom of Denmark and DSB that the Commission's decision would be the same if the compatibility of the aid at issue were assessed on the basis of Regulation No 1191/69 as well as DSB's argument, put forward at the hearing, that an error in the choice of legal basis is not capable of leading to the annulment of the contested decision.

- 59 Having regard to the foregoing, the second paragraph of Article 1 of the contested decision must be annulled and there is no need to examine the other pleas in the action.

Costs

- 60 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.
- 61 Under the first subparagraph of Article 87(4) of the Rules of Procedure, Member States which intervened in the proceedings are to bear their own costs. Furthermore, under the third subparagraph of Article 87(4) of the Rules of Procedure, the Court may order an intervener to bear his own costs.
- 62 Since the Commission has been unsuccessful, it must be ordered to bear its own costs and to pay those incurred by the applicant, in accordance with the form of order sought by the latter, with the exception of the costs caused by the interventions.
- 63 The Kingdom of Denmark and DSB, which intervened in support of the Commission, are to bear their own costs and to pay the costs incurred by the applicant in connection with the interventions, in accordance with the form of order sought by the latter.

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

- 1. Annuls the second paragraph of Article 1 of Commission Decision 2011/3/EU of 24 February 2010 concerning public transport service contracts between the Danish Ministry of Transport and Danske Statsbaner (Case C 41/08 (ex NN 35/08));**

2. **Orders the European Commission to bear its own costs and to pay the costs incurred by Mr Jørgen Andersen, with the exception of those arising from the interventions;**
3. **Orders the Kingdom of Denmark to bear its own costs and to pay those incurred by Mr Andersen arising from its intervention;**
4. **Orders Danske Statsbaner (DSB) to bear its own costs and to pay those incurred by Mr Andersen arising from its intervention.**

Papasavvas

Vadapalas

O'Higgins

Delivered in open court in Luxembourg on 20 March 2013.

[Signatures]