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EUROOPAN UNIONIN TUOMIOISTUIN
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JUDGMENT OF THE COURT (Tenth Chamber)

10 November 2022 *

(Appeal – State aid – Postal sector – Compensation for the discharge of a universal service obligation – Calculation – Net avoided cost methodology – Taking into account the intangible benefits of the universal service – Use of funds granted as compensation – Guarantee covering the redundancy costs of a certain category of employee in the event of insolvency of the universal service provider – Accounting allocation of common costs between universal service activities and non-universal service activities – Decision declaring the aid compatible with the internal market)

In Case C-442/21 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 15 July 2021,

ITD, Brancheorganisation for den danske vejgodstransport A/S, established in Padborg (Denmark),

Danske Fragtmænd A/S, established in Åbyhøj (Denmark),

represented by L. Sandberg-Mørch, advokat,

appellants,

the other parties to the proceedings being:

European Commission, represented by K. Blanck, J. Carpi Badía and L. Nicolae, acting as Agents,

defendant at first instance,

supported by:

* Language of the case: English.

Post Danmark, established in Copenhagen (Denmark), represented by O. Koktvedgaard, advokat,

intervener in the appeal,

Jørgen Jensen Distribution A/S,

Dansk Distribution A/S,

Kingdom of Denmark, represented initially by V. Pasternak Jørgensen and M. Søndahl Wolff, acting as Agents, and by R. Holdgaard, advokat, and subsequently by M. Søndahl Wolff, acting as Agent, and by R. Holdgaard, advokat,

interveners at first instance,

THE COURT (Tenth Chamber),

composed of D. Gratsias (Rapporteur), President of the Chamber, M. Ilešič and I. Jarukaitis, Judges,

Advocate General: P. Pikamäe,

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

Judgment

- 1 By their appeal, ITD, Brancheorganisation for den danske vejgodstransport A/S ('ITD') and Danske Fragtmænd A/S seek to have set aside in part the judgment of the General Court of the European Union of 5 May 2021, *ITD and Danske Fragtmænd v Commission* (T-561/18, EU:T:2021:240) ('the judgment under appeal'), to the extent that it partially dismissed their application pursuant to Article 263 TFEU for annulment of Commission Decision C(2018) 3169 final of 28 May 2018, concerning State aid SA.47707 (2018/N). – State compensations granted to PostNord for the provision of the universal postal service – Denmark ('the decision at issue').

Legal context

- 2 Under Article 1 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 [TFEU] (OJ 2015 L 248, p. 9):

‘For the purposes of this Regulation, the following definitions shall apply:

...

- (b) “existing aid” means:

...

- (iv) aid which is deemed to be existing aid pursuant to Article 17 of this Regulation;

...

- (d) “aid scheme” ... any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount;

...

- (g) “misuse of aid” means: aid used by the beneficiary in contravention of a decision taken pursuant to Article 4(3) or Article 7(3) or (4) of [Council] Regulation (EC) No 659/1999 [of 22 March 1999 laying down detailed rules for the application of Article 93[EC] (OJ 1999 L 83, p. 1),] or Article 4(3) or Article 9(3) or (4) of this Regulation;

...’

- 3 Article 4 of Regulation 2015/1589 is worded as follows:

‘1. The [European] Commission shall examine the notification as soon as it is received. Without prejudice to Article 10, the Commission shall take a decision pursuant to paragraphs 2, 3 or 4 of this Article.

2. Where the Commission, after a preliminary examination, finds that the notified measure does not constitute aid, it shall record that finding by way of a decision.

3. Where the Commission, after a preliminary examination, finds that no doubts are raised as to the compatibility with the internal market of a notified measure, in so far as it falls within the scope of Article 107(1) TFEU, it shall decide that the measure is compatible with the internal market ... That decision shall specify which exception under the TFEU has been applied.

4. Where the Commission, after a preliminary examination, finds that doubts are raised as to the compatibility with the internal market of a notified measure, it shall decide to initiate proceedings pursuant to Article 108(2) [TFEU] ...

...’

4 Article 17 of Regulation 2015/1589 provides:

‘1. The powers of the Commission to recover aid shall be subject to a limitation period of 10 years.

...

3. Any aid with regard to which the limitation period has expired shall be deemed to be existing aid.’

5 Article 1 of Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (OJ 1998 L 15, p. 14), as amended by Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 (OJ 2008 L 52, p. 3) (‘Directive 97/67’), provides:

‘This Directive establishes common rules concerning:

- the conditions governing the provision of postal services,
- the provision of a universal postal service within the Community,
- the financing of universal services under conditions that guarantee the permanent provision of such services,
- tariff principles and transparency of accounts for universal service provision,
- the setting of quality standards for universal service provision and the setting-up of a system to ensure compliance with those standards,

...’

6 Article 3 of Directive 97/67 provides:

‘1. Member States shall ensure that users enjoy the right to a universal service involving the permanent provision of a postal service of specified quality at all points in their territory at affordable prices for all users.

...

4. Each Member State shall adopt the measures necessary to ensure that the universal service includes the following minimum facilities:

- the clearance, sorting, transport and distribution of postal items up to two kilograms,
 - the clearance, sorting, transport and distribution of postal packages up to 10 kilograms,
 - services for registered items and insured items.
- ...’

7 Article 14(1) and (4) of that directive is worded as follows:

‘1. Member States shall take the measures necessary to ensure that the accounting of the universal service providers is conducted in accordance with the provisions of this Article.

2. The universal service provider(s) shall keep separate accounts within their internal accounting systems in order to clearly distinguish between each of the services and products which are part of the universal service and those which are not. This accounting separation shall be used as an input when Member States calculate the net cost of the universal service. Such internal accounting systems shall operate on the basis of consistently applied and objectively justifiable cost accounting principles.

3. The accounting systems referred to in paragraph 2 shall, without prejudice to paragraph 4, allocate costs in the following manner:

- (a) costs which can be directly assigned to a particular service or product shall be so assigned;
- (b) common costs, that is costs which cannot be directly assigned to a particular service or product, shall be allocated as follows:
 - (i) whenever possible, common costs shall be allocated on the basis of direct analysis of the origin of the costs themselves;
 - (ii) when direct analysis is not possible, common cost categories shall be allocated on the basis of an indirect linkage to another cost category or group of cost categories for which a direct assignment or allocation is possible; the indirect linkage shall be based on comparable cost structures;
 - (iii) when neither direct nor indirect measures of cost allocation can be found, the cost category shall be allocated on the basis of a general allocator computed by using the ratio of all expenses directly or indirectly assigned or allocated, on the one hand, to each of the universal services and, on the other hand, to the other services;

- (iv) common costs, which are necessary for the provision of both universal services and non-universal services, shall be allocated appropriately; the same cost drivers must be applied to both universal services and non-universal services.

4. Other cost accounting systems may be applied only if they are compatible with paragraph 2 and have been approved by the national regulatory authority. The Commission shall be informed prior to their application.'

- 8 Annex I of that directive, entitled 'Guidance on calculating the net cost, if any, of universal service', provides, in Part B on calculating the net cost of universal service obligations:

'...

The net cost of universal service obligations is any cost related to and necessary for the operation of the universal service provision. The net cost of universal service obligations is to be calculated, as the difference between the net cost for a designated universal service provider of operating with the universal service obligations and the same postal service provider operating without the universal service obligations.

The calculation shall take into account all other relevant elements, including any intangible and market benefits which accrue to a postal service provider designated to provide universal service, the entitlement to a reasonable profit and incentives for cost efficiency.

Due attention is to be given to correctly assessing the costs that any designated universal service provider would have chosen to avoid, had there been no universal service obligation. The net cost calculation should assess the benefits, including intangible benefits, to the universal service operator.

...'

The background to the dispute

- 9 The background to the dispute is set out in paragraphs 1 to 30 of the judgment under appeal and, to the extent that it is relevant in these proceedings, may be summarised as set out below.
- 10 ITD is a trade association of companies incorporated under Danish law which are active on the national and international markets for road transport of goods and logistics services. Danske Fragtmænd is a company incorporated under Danish law and active, inter alia, on the Danish market for road transport of goods and parcel distribution services.

- 11 The postloven, lov nr. 1536 (Postal Law No 1536) of 21 December 2010 (*Lovtidende* 2010 A), as amended, designated Post Danmark A/S as universal postal service provider in Denmark. On the basis of that law, on 30 May 2016, the Danish Ministry of Transport adopted a public service entrustment act under which Post Danmark was entrusted with a universal service obligation for the period from 1 July 2016 to 31 December 2019 ('the universal service entrustment'). Post Danmark is 100% owned by PostNord AB, whose share capital is itself 40% owned by the Kingdom of Denmark and 60% owned by the Kingdom of Sweden, with each of the two shareholder States having 50% of the voting rights in the board of directors.
- 12 According to point 2 of the universal service entrustment, that service must be provided both at national and international level and must be guaranteed at least five working days per week. It must include the following services:
 - the clearance, sorting, transport and distribution of postal consignments of letters, periodicals (daily, weekly and monthly) and advertising mail (catalogues and brochures) up to 2 kilograms;
 - the clearance, sorting, transport and distribution of parcels of up to 20 kilograms with home delivery or delivery to a self-service point, whereas the sending of parcels between professionals covered by a distribution contract is not included in the universal service;
 - services for registered items and insured items;
 - a free postal service for blind persons, for items weighing up to 7 kilograms.
- 13 From the early 2000s, the generalised use of electronic communications resulted in a decrease in postal letters, to such an extent that, mainly for that reason, Post Danmark's turnover fell by 38% between 2009 and 2016. It was in that context that, on 23 February 2017, PostNord increased the share capital of Post Danmark in the amount of one billion Danish kroner (DKK) (approximately EUR 134 million) ('the capital increase of 23 February 2017').
- 14 Considering the consequences of the digitalisation of communications, the Kingdom of Denmark and the Kingdom of Sweden also concluded, on 20 October 2017, an agreement relating to the transformation of Post Danmark's production model ('the agreement of 20 October 2017'), as developed by PostNord and formalised in a proposal from its board of directors of 29 September 2017. Under that agreement, PostNord's new production model was to be based on increases in Post Danmark's capital and on a reduction in staff of approximately 4 000 employees, with an overall estimated cost of approximately 5 billion Swedish kronor (SEK) (approximately EUR 491 million).
- 15 In particular, the implementation of Post Danmark's new production model included the cost of special redundancy payments for its former civil servants, who had become its employees on 1 January 2002, namely at the time of its

transformation from an independent public enterprise to a limited liability company ('the former civil servants of Post Danmark'). In that regard, the agreement of 20 October 2017 stated that the Kingdom of Denmark was to offset those costs by way of a capital contribution to PostNord of SEK 1.533 billion (approximately EUR 150 million).

- 16 Post Danmark's new production model was to be implemented by three separate measures, namely:
 - compensation for the provision of the universal service in Denmark, paid by the Danish authorities to Post Danmark, through PostNord, the amount of which would be used to finance part of the special redundancy payments for former Post Danmark civil servants;
 - a capital increase in PostNord of SEK 667 million (approximately EUR 65 million) by the Kingdom of Denmark and the Kingdom of Sweden;
 - an internal contribution of PostNord to Post Danmark of approximately DKK 2.3 billion (approximately EUR 309 million).
- 17 On 3 November 2017, the Danish authorities pre-notified the Commission of the first of those three measures, namely the grant of compensation in the amount of SEK 1.533 billion paid to Post Danmark, through PostNord, for the provision of the universal postal service in Denmark between 2017 and 2019, with that sum being allocated to fund part of the redundancy costs described in paragraph 15 of the present judgment.
- 18 On 27 November 2017, ITD lodged a complaint with the Commission alleging that, by a number of past or future measures, the Danish and Swedish authorities had granted or would grant unlawful State aid to Post Danmark.
- 19 According to the complaint, that aid resulted from:
 - first, the existence of a guarantee under which, in the event of Post Danmark's bankruptcy, the Kingdom of Denmark undertook to pay to Post Danmark, without any consideration in return, the costs relating to the redundancy payments for former civil servants of Post Danmark who retained their status as a civil servants on 1 January 2002, the date of its transformation into a limited liability company, corresponding to three years' wages for each former civil servant ('the state guarantee at issue');
 - a Danish administrative practice that allowed exemption from value added tax (VAT) for customers of mail-order companies when those companies chose to purchase a transport service from Post Danmark resulting in an increase in demand for the latter;
 - misallocation, between 2006 and 2013, of the common costs between universal service obligation and non-universal service obligation activities ('common

- costs’). That misallocation resulted in an artificial increase in the cost of performing the universal service obligation and an artificial reduction of the cost of Post Danmark’s commercial activities and thus constituting cross-subsidisation of Post Danmark’s commercial activities by remuneration intended for the universal service obligation;
- the capital increase of 23 February 2017, in so far as it was imputable to the Danish and Swedish States and such a measure did not satisfy the private investor in a market economy test;
 - the grant of compensation in the amount of SEK 1.533 billion paid to Post Danmark, through PostNord, for the provision of the universal postal service in Denmark between 2017 and 2019, with that sum being allocated to fund part of the redundancy costs described in the first indent above;
 - increases in Post Danmark’s capital by the Kingdom of Denmark, the Kingdom of Sweden and PostNord, as provided for in the agreement of 20 October 2017.
- 20 On 8 February 2018, the Danish authorities notified the Commission of the award to Post Danmark of compensation in the amount of SEK 1.533 billion for the provision of the universal postal service for the years 2017 to 2019 (‘the compensation for provision of the universal service 2017-2019’). On 7 May 2018, the Danish authorities stated that the compensation at issue would ultimately be up to a maximum amount of SEK 1.683 billion or of DKK 1.192 billion (approximately EUR 160 million).
- 21 On 28 May 2018, without initiating the formal investigation procedure, the Commission adopted the decision at issue.
- 22 In that decision, the Commission examined, first, the compensation for provision of the universal service 2017-2019 and, secondly, the criticisms made by ITD in its complaint, with the exception however of the increases of capital provided for by the agreement of 20 October 2017, referred to in paragraphs 14 and 15 of this judgment, in respect of which that institution stated that they would be the subject of a later decision.
- 23 As regards the compensation for provision of the universal service 2017-2019, the Commission considered, first of all, that it did not meet the fourth criterion of those set out in the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415). According to the Commission, first, that compensation had not been awarded in the context of a public procurement procedure and, secondly, the amount had not been determined on the basis of the costs of a typical well-run undertaking. The Commission concluded therefrom that that measure constituted State aid, within the meaning of Article 107(1) TFEU, and that it was necessary to assess the compatibility of that aid with the internal market in the light of Article 106(2) TFEU, taking into account the Communication from the Commission entitled ‘European Union

framework for State aid in the form of public service compensation (2011)’ (OJ 2012 C 8, p. 15; ‘the SGEI Framework’).

- 24 In that context, the Commission examined the calculation, by the Danish authorities, of the net costs necessary for the performance of the universal service obligation using the ‘net avoided cost methodology’. According to paragraph 25 of the SGEI Framework, the net avoided cost methodology consists of calculating the net cost necessary, or expected to be necessary, to discharge the public service obligations as the difference between the net cost for the provider of operating with the public service obligation (‘the factual scenario’) and the net cost or profit for the same provider of operating without that obligation (‘the counterfactual scenario’).
- 25 In their calculation method, the Danish authorities assumed a factual scenario according to which, by providing the universal service obligation, Post Danmark expected:
- first, substantial growth in the business-to-consumer market due to increased e-commerce;
 - secondly, continuing decreases in letter volumes following increased digitalisation;
 - thirdly, significant decreases in mail volumes for newspapers and magazines, and,
 - fourthly, the implementation of a new production model involving the redundancy of employees.
- 26 According to the counterfactual scenario proposed by the Danish authorities, if Post Danmark had not been entrusted with the universal service obligation, it would have resulted in:
- first, the discontinuation of unprofitable activities, such as the delivery of newspapers and magazines, non-addressed items and international postal items;
 - secondly, the optimisation of the distribution of business letters by offering home delivery only in larger cities;
 - thirdly, the discontinuation of the home delivery of parcels in certain rural areas; and,
 - fourthly, a reduction in the number of postal service outlets.
- 27 The Danish authorities calculated the costs which would have been avoided if the universal service obligation had not been entrusted to Post Danmark, on the basis of, inter alia, personnel costs, in connection with:

- first, maintaining a network of mailboxes covering the whole national territory and the production of stamps;
 - secondly, the operation of the international mail and parcel centre in Copenhagen (Denmark), that would be closed after the discontinuation of international postal items;
 - thirdly, letters sorting centres and distribution hubs closed after optimisation of the distribution of business letters;
 - fourthly, home delivery of postal items in certain areas; and
 - fifthly, the operation of postal outlets that would be closed.
- 28 From the costs that would have been avoided if the universal service obligation had not been entrusted to Post Danmark, the Danish authorities deducted:
- first, the revenue from the services that would have been discontinued or optimised by Post Danmark in the absence of the universal service obligation and;
 - secondly, the profit from an increase in demand as a result of the VAT exemption from which it had benefited as a universal service provider; and,
 - thirdly, the intangible benefits to intellectual property assets related to the universal service obligation, in particular publicity benefits relating to its visibility on contact points and mailboxes.
- 29 The Commission considered that the method proposed by the Danish authorities was reliable and noted that, according to that method, the net avoided costs for the discharge of the universal service obligation was DKK 2.571 billion (approximately EUR 345 million), which was considerably higher than the compensation for provision of the universal service 2017-2019, set at a maximum of DKK 1.192 billion (approximately EUR 160 million).
- 30 In addition, the Commission found that the Danish authorities had introduced sufficient incentives for the efficient provision of the universal service which satisfied paragraphs 39 to 43 of the SGEI Framework. In particular, first, the Commission found that a significant efficiency incentive could be inferred from the fact that that compensation would be paid upfront and that it represented 46% of the net avoided cost, which allowed Post Danmark to retain all efficiency gains on condition that it did not lead to overcompensation. Secondly, the quality standards laid down in relation to Post Danmark in the universal service entrustment and the penance system established in the event of non-compliance with those standards were such as to ensure that those efficiency gains would not prejudice the quality of the universal service provided.

- 31 After having rejected the claims put forward by ITD in its complaint and specifically directed against the compensation for provision of the universal service 2017-2019, the Commission concluded that it was compatible with the internal market.
- 32 As regards the other claims raised in ITD’s complaint, first, the Commission found that the state guarantee at issue could constitute State aid. In that regard, the Commission considered that that guarantee might have given rise to an advantage, albeit very indirect, in so far as it had allowed Post Danmark, at the time of its transformation into a limited liability company, in 2002, to retain a part of its staff. Nevertheless, the Commission considered that, even if the state guarantee at issue did constitute State aid, that aid had been granted in 2002, since it applied only to the employees who had renounced their status as civil servants at that time. Accordingly, that guarantee was granted more than 10 years before the Commission was informed of that measure by ITD’s complaint, and therefore constituted an aid with regard to which the 10-year limitation period had expired and thus, in accordance with Article 1(b)(iv) and Article 17(1) of Regulation 2015/1589, an existing aid.
- 33 As regards the allocation of costs relating to Post Danmark’s various activities, the Commission accepted the Danish authorities’ explanations and concluded that the accounting allocation of common costs was appropriate. The Commission added that, in any event, the misallocation of costs alleged by ITD did not seem, first of all, to involve the transfer of any State resources. Next, according to the decision at issue, that allocation was not imputable to the Danish authorities, since, although it was true that they had adopted the accounting regulation applicable to Post Danmark, ITD had not, however, shown how they had been involved in Post Danmark’s setting of prices for its activities that did not fall within discharging the universal service obligation. Lastly, the Commission found that the alleged cross-subsidisation of Post Danmark’s commercial activities by funds received in respect of the universal service obligation did not constitute an advantage, since Post Danmark had never received any compensation for the discharge of the universal service obligation, calculated on the basis of the cost allocation as alleged by ITD.
- 34 The concluding paragraphs of the decision at issue read as follows:
- ‘(205) The Commission has decided to consider [the compensation for provision of the universal service 2017-2019] compatible with the internal market on the basis of Article 106(2) TFEU and to raise no objections to [that measure].
- (206) The Commission has decided further that:
- (i) the [state guarantee at issue] is existing aid;
 - (ii) the VAT exemption does not constitute State aid;

- (iii) the cross-subsidisation of commercial services is not factually confirmed and in any event does not constitute State aid; and
- (iv) the [capital increase of 23 February 2017] does not constitute State aid.’

The procedure before the General Court and the judgment under appeal

- 35 By application lodged at the Registry of the General Court on 20 September 2018, the appellants brought an action for the annulment of the decision at issue.
- 36 In support of their action, the appellants raised a single plea in law, alleging that the Commission had failed to initiate the formal investigation procedure provided for in Article 108(2) TFEU, despite the serious difficulties raised by the assessment of the compensation for provision of the universal service 2017-2019 and of the other measures challenged in ITD’s complaint. That plea was divided into two parts.
- 37 In support of the second part of the single plea, which alone is relevant for the purposes of this appeal, the appellants submit that the Commission had made a number of errors which demonstrate that there were serious difficulties that the Commission had encountered when examining whether those measures constituted aid and whether they were compatible with the internal market, when it considered in the decision at issue that:
- the compensation for provision of the universal service 2017-2019 was compatible with the internal market;
 - the state guarantee at issue was an existing aid;
 - the VAT exemption in favour of Post Danmark was not imputable to the State;
 - the allocation, by Post Danmark’s accounting department, of common costs was not vitiated by an error, did not involve a transfer of State resources and was not imputable to the State; and
 - the capital increase of 23 February 2017 was not imputable to the State and did not constitute an economic advantage.
- 38 By the judgment under appeal, the General Court annulled the decision at issue in so far as it found, at the end of the preliminary examination stage, that, first, the exemption from VAT and, secondly, the capital increase of 23 February 2017 did not constitute State aid.
- 39 By contrast, the General Court dismissed the action in so far as it concerned three other aspects of the decision at issue. Those aspects being, first, the compensation for provision of the universal service 2017-2019, secondly the state guarantee at issue, and thirdly, the accounting allocation of common costs.

The compensation for provision of the universal service 2017-2019

- 40 The appellants raised, before the General Court, in support of the second part of their single plea, three claims against the decision at issue, in that, by that decision, the Commission had decided that the compensation for provision of the universal service 2017-2019 was compatible with the internal market.
- 41 By the first claim, the appellants criticise the Commission for accepting a method of calculating the net avoided cost which did not make any deductions for intangible benefits linked to the enhancement of Post Danmark’s reputation and to Post Danmark’s ubiquity on Danish territory.
- 42 As regards the alleged enhancement of Post Danmark’s reputation, the General Court confirmed the Commission’s assessment that, in essence, the financial difficulties that Post Danmark had encountered owing to the fall in its turnover between 2009 and 2016 had resulted, first, in a reduction in the provision of services offered in discharge of the universal service obligation and, secondly, in an increase in the price of those services. Those circumstances were such as to exclude the existence of serious difficulties as regards the failure to deduct profits linked to the enhancement of Post Danmark’s reputation in the calculation of the net avoided cost. In addition, the General Court found that, for the purposes of deducting intangible benefits in the context of the net avoided cost calculation, it was necessary not to assess the value of the corporate brand of the universal service provider but rather to determine whether the reputation of a universal service provider is enhanced by the fact that it provides such a service. The General Court held that none of the points put forward by the appellants were capable of establishing that the fact that the Danish authorities did not take into account the enhancement of the brand image as a result of discharging the universal service obligation in the net avoided cost calculation should have given rise to doubts on the part of the Commission, amounting to serious difficulties in the assessment of the compatibility of the compensation for provision of the universal service 2017-2019 with the internal market.
- 43 As regards Post Danmark’s ubiquity on the Danish territory, the General Court confirmed the Commission’s assessment according to which, first, the fact that clients of distributors of catalogues, magazines and newspapers were, according to the Danish authorities, fully prepared to select distributors that do not offer universal territorial coverage tended to establish that Post Danmark did not enjoy, by virtue of its status as a universal service provider, an intangible benefit linked to ubiquity. Secondly, the General Court also confirmed the Commission’s assessment that, even if it had not been entrusted with the universal service obligation, Post Danmark’s ubiquity would not have been fundamentally altered with regard to services connected with e-commerce given that it would have continued to offer, over the entire Danish territory, distribution of parcels other than single-piece parcels, with or without home delivery depending on the geographical area. The General Court held that the evidence furnished by the appellants did not establish that the fact that no specific deductions were made for

intangible benefits linked to ubiquity, in the net avoided cost calculation submitted by the Danish authorities, should have resulted in the Commission being faced with serious difficulties regarding the compatibility of the compensation for provision of the universal service 2017-2019 with the internal market.

- 44 By the second claim, the appellants submitted that Post Danmark could not be regarded as an efficient service provider owing to its poor financial state. The General Court found that that claim was based on confusion between, first, efficiency incentives as required under paragraphs 39 to 43 of the SGEI Framework, which seek to ensure that the provision of a universal service provides efficiency gains while ensuring quality service and, secondly, the idea that the net avoided cost is calculated on the basis of an efficient service provider, which is not relevant when assessing the compatibility of the aid in the context of the application of Article 106(2) TFEU. Taking into account the economic efficiency of the universal service provider would be tantamount to requiring that such a service always be provided under normal market conditions, which could potentially obstruct the fulfilment, in law or in fact, of the particular task assigned to undertakings entrusted with the operation of a service of general economic interest. Article 106(2) TFEU is specifically intended to prevent such a situation. It followed that the arguments put forward by the appellants did not support the conclusion that such considerations constituted evidence of the existence of serious difficulties facing the Commission during the assessment of the compatibility of the compensation for provision of the universal service 2017-2019.
- 45 By its third claim, the appellants criticised the Commission:
- first, for finding that the compensation for provision of the universal service 2017-2019 was compatible with the internal market, on the basis of the SGEI Framework, while expressly authorising that such compensation be used to pay the costs arising from the dismissal of former civil servants of Post Danmark, those costs being unrelated to the discharge of the universal service obligation;
 - secondly, for having included the costs in question within the net avoided cost, without it having been established that the former civil servants of Post Danmark concerned, who became employees, worked for the purposes of discharging the universal service obligation;
 - thirdly, for not having assessed the compatibility of the compensation for provision of the universal service 2017-2019 on the basis of the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (OJ 2014 C 249, p. 1; ‘the Guidelines on State aid for rescuing and restructuring’).
- 46 As regards the first part of that claim, the General Court held that the fact that the sum granted by way of the compensation for provision of the universal service 2017-2019 may be used for a purpose other than the discharge of the universal

service obligation does not in itself demonstrate that the Commission encountered serious difficulties in assessing the compatibility of such a measure or that such use constitutes misuse of aid.

- 47 As regards the second part of that claim, the General Court recalled inter alia that the creation of a new production model within Post Danmark was made necessary by the change in the nature of the postal market due to the increased use of electronic communications in Denmark and that the new model in question was largely focused on the rationalisation of certain personnel costs associated with mail delivery. Furthermore, the Danish authorities adopted a cautious approach in considering, even if it had not been entrusted with the universal service obligation, that, Post Danmark would still have had to pay, in the same amount, the costs of dismissing former civil servants, which reduced the impact of those costs on the amount of the net avoided cost.
- 48 Finally, the General Court rejected the third part of that claim on the ground that it had been raised only in the appellants' observations on the statement in intervention of the Kingdom of Denmark.
- 49 Thus, the General Court decided that the appellants had not produced evidence of the existence of serious difficulties with which the Commission was confronted when assessing of the compatibility of the compensation for provision of the universal service 2017-2019 with the internal market. That conclusion was supported by the fact that the amount of the net avoided cost calculated, namely DKK 2.571 billion (approximately EUR 345 million), was significantly higher than the maximum amount of the compensation for provision of the universal service 2017-2019, which was DKK 1.192 billion (approximately EUR 160 million).

The state guarantee at issue

- 50 In support of their action, the appellants submitted that the state guarantee at issue could not be regarded as having been granted at the time of its adoption, namely in 2002. Thus, contrary to the Commission's finding in the decision at issue, that guarantee was not an 'existing aid' within the meaning of Article 17 of Regulation 2015/1589.
- 51 In that regard, the General Court recalled that the state guarantee at issue had been granted by Paragraph 9 of lov nr. 409 om Post Danmark A/S (Law No 409 on Post Danmark) of 6 June 2002 (*Lovtidende 2002 A*). According to the General Court, the appellants' argument was based on confusion between, on the one hand, advantages granted on a periodic basis, pursuant to the repeated individual application of an aid scheme and, on the other hand, the grant of an individual guarantee which may have the effect of continuously improving the situation of the beneficiary. In the latter case, the date on which the aid was granted was the date on which the guarantee was adopted. Therefore the Commission did not err in having determined that the starting point of the limitation period relating to any

aid that may have been granted by means of that guarantee was the date of its adoption, namely 6 June 2002. In any event, as that guarantee could only be implemented in the event of the Post Danmark's bankruptcy, it was not of such a nature as to improve Post Danmark's financial situation.

Accounting allocation of common costs

- 52 Before the General Court, the appellants submitted, in essence, that the Commission had erred in concluding, first, that the accounting allocation of common costs had been adequate and, secondly, that that allocation did not, in any event, demonstrate the imputability of the State, the transfer of State resources or the grant of an advantage. A number of the alleged errors identified by the appellants meant that the examination carried out by the Commission during the preliminary investigation procedure was insufficient and constituted evidence of the existence of serious difficulties, in the presence of which the Commission should have initiated the formal investigation procedure. In particular, the national accounting regulation applicable to Post Danmark between 2006 and 2013, or successively from 2006 to 2011 ('the 2006 accounting regulation'), then from 2011 until 2013 ('the 2011 accounting regulation') imposed on Post Danmark a misallocation of common costs. That regulation allowed Post Danmark to allocate all common costs to the discharge of the universal service obligation, regardless of whether a part of the costs was shared by services that were unconnected with that obligation.
- 53 In that regard, the General Court observed that the Commission had based its conclusion, principally, on the erroneous nature of the claim that the accounting rules applicable to Post Danmark had led to a misallocation of common costs and, in any event, on the fact that the allocation of common costs in accordance with the 2006 and 2011 accounting regulations did not constitute State aid within the meaning of Article 107(1) TFEU, as a number of the criteria laid down in that provision had not been met. The Commission had therefore, according to the General Court, carried out a complete assessment of the issue. Moreover, following an examination of the 2011 accounting regulation and having found that the 2006 accounting regulation was similarly drafted, the General Court held that the alleged allocation of common costs solely to the costs of discharging the universal service obligation had not been established and that the accounting regulation applicable to Post Danmark between 2006 and 2013 resulted in an appropriate allocation of the different types of costs.

The procedure before the Court of Justice and the forms of order sought

- 54 By order of the President of the Court of 26 January 2022, *ITD and Danske Fragtmænd v Commission* (C-442/21 P, not published, EU:C:2022:106), Post Danmark was granted leave to intervene in these proceedings in support of the forms of order sought by the Commission. It was stated nevertheless that, in

accordance with Article 129(4) of the Rules of Procedure of the Court of Justice, Post Danmark could make its submissions at the hearing, if one took place.

55 The appellants claim that the Court should:

- set aside the judgment under appeal to the extent that, by it, the General Court dismissed their action in so far as it was directed at the parts of the decision at issue in which the Commission, without initiating the formal investigation procedure provided for in Article 108(2) TFEU, decided, first, that the compensation for provision of the universal service 2017-2019 was compatible with the internal market, secondly, that the state guarantee at issue constituted existing aid and that, thirdly, the accounting allocation of common costs had been adequate and did not, in any event, demonstrate imputability to the State, the transfer of State resources or the grant of an advantage; and
- order the Commission to pay the costs.

56 The Commission contends that the Court should:

- dismiss the appeal; and
- order the appellants to pay the costs.

57 The Kingdom of Denmark contends that the Court should dismiss the appeal.

The appeal

58 The appellants raise four grounds in support of their appeal.

59 By the first, second and fourth grounds of appeal, the appellants challenge the analysis on the basis of which the General Court rejected the claims made against the Commission's assessments concerning the calculation of net avoided cost relating to the discharge of the universal service obligation 2017-2019. The third ground of appeal is directed against the General Court's assessments by which it rejected the claims in which the appellants criticised the Commission's analysis regarding the state guarantee at issue.

60 In particular, the first ground alleges that the General Court erred in law and distorted the evidence as regards the intangible benefits that Post Danmark would have benefited from as a universal service provider, namely the enhancement of its reputation and its ubiquity, and as regards efficiency incentives. The second ground alleges that the General Court erred in law and distorted the evidence in respect of the costs arising from the dismissal of former civil servants of Post Danmark. The third ground of appeal alleges that the General Court erred in law as regards the classification of the state guarantee at issue as an existing aid. The fourth ground alleges that the General Court erred in law and distorted the evidence as regards the accounting allocation of common costs.

The first ground of appeal, alleging an error of law and distortion of the evidence as regards intangible benefits and efficiency incentives

The alleged enhancement of Post Danmark's reputation as an intangible benefit

– *Arguments of the parties*

- 61 The appellants submit, first, that contrary to the finding by the General Court, it was for the Commission and not the appellants to examine whether the quality of the universal service was such that it enhanced Post Danmark's reputation to the benefit of the other services that it also offered. In any event, as the General Court moreover recognised in paragraph 144 of the judgment under appeal, the appellants had proven the fact that the universal service provided by Post Danmark was of a high standard. That fact is demonstrated by the increase in price for that service, which Post Danmark was able to implement. In addition, the General Court cannot draw support from Post Danmark's financial difficulties to refute the enhancement of its reputation following the attribution of the universal service, since the Commission did not rely on that fact in the decision at issue. Secondly, the failure to consider that issue in the decision at issue alone suffices to show that there were serious doubts as to the compatibility of the compensation for provision of the universal service 2017-2019 with the internal market. Thirdly, the appellants submit that the General Court did not take into account the fact that consumers retain in their mind a link between Post Danmark and the Danish State even if that state does not provide the universal service. Consequently, any element of that kind which affects positively Post Danmark's reputation should be excluded from the counterfactual scenario. Fourthly and lastly, the appellants submit that the General Court distorted the content of the elements showing that Post Danmark's reputation was enhanced as a result of discharging the universal service obligation.
- 62 The Commission and the Danish Government contest the admissibility and the merits of those arguments.

– *Findings of the Court*

- 63 As regards the alleged enhancement of Post Danmark's reputation, the General Court recalled, first, in paragraphs 131 and 132 of the judgment under appeal, that, according to Annex I to Directive 97/67 and paragraph 25 of the SGEI Framework, the net avoided cost calculation must assess the benefits, including intangible benefits, to the provider of the service of general economic interest (SGEI), where those benefits are attributable to an SGEI.
- 64 Secondly, the General Court found, in paragraphs 134 to 137 of the judgment under appeal that, although the Commission took into account two categories of intangible benefits resulting from, first, the VAT exemption for services falling within the discharge of universal service obligations and, second, the publicity

benefits of visible contact points such as mailboxes and installations for customers' self-service collection of parcels, that institution did not take into account the intangible benefits connected with the enhancement of Post Danmark's reputation and its ubiquity on the Danish territory.

- 65 Thirdly, the General Court recognised, in paragraphs 140 and 141 of that judgment, that the evidence produced by the appellants, including a study carried out in 2010 by WIK Consult at the request of the Autorité de régulation des communications électroniques et des postes (ARCEP) (Authority for the Regulation of Electronic Communications and Postal Services (ARCEP), France) ('the 2010 WIK Study') and a report of August 2012 by the European Regulators Group for Postal Services (ERGP) on the net avoided cost calculation, showed that the enhancement to the reputation of the universal service provider could be regarded as being an intangible benefit attributable to the universal service obligation in the postal sector. According to the General Court, those documents stated that identification of the benefit connected with the enhancement of the reputation of the universal service provider was however based on studies dating from 2001, 2002 and 2008.
- 66 However, in paragraph 142 of that judgment, the General Court found that the appellants had not been able to explain how those considerations applied to Post Danmark, for which the generalised use of electronic communications had resulted in a fall in turnover of 38% between 2009 and 2016. On that last point, the financial difficulties that Post Danmark faced during that period had led, according to the General Court, first, to a reduction in the provision of services offered under the universal service obligation and, secondly, to an increase in the price of those services, which were such as to exclude the existence of serious difficulties confronted by the Commission in its examination of the failure to deduct profits linked to the enhancement of Post Danmark's reputation in the calculation of the net avoided cost.
- 67 In paragraph 143 of the judgment under appeal, the General Court held that that conclusion was not called into question by the report from the United States Postal Service Office of Inspector General, dated 28 January 2015, on the value of the brand of the operator US Postal ('the US Postal report'), that the appellants had produced as an annex to their application before the General Court which showed that, despite its financial difficulties, the value of the corporate brand of US Postal, which is entrusted with the universal service obligation in the United States, had remained at a very high level equivalent to the cost of that obligation. According to the General Court, even if it were to be assumed that the context in which US Postal operates was analogous to that of Post Danmark, the significance of the value of its corporate brand and its comparison with the cost of the universal service obligation were irrelevant for the purpose of establishing that the reputation of the company would be affected by not being entrusted with the universal service obligation. For the purposes of deducting intangible benefits in the context of the net avoided cost calculation, it is necessary not to assess the value of the corporate brand of the universal service provider but rather to

determine whether the reputation of a universal service provider is enhanced by the fact that it provides such a service.

- 68 Similarly, the General Court held, in paragraphs 145 to 148 of the judgment under appeal, that the appellants could not validly rely on the 2010 WIK study, relating to the French operator, La Poste, or on a report of 20 December 2017 on the postal strategy of the Irish operator An Post for the period 2018 to 2020. First, the conclusion of the 2010 WIK study was linked to circumstances that were specific to the provider concerned. The appellants had not established, or even maintained, that such circumstances could be applied to Post Danmark. Secondly, it was apparent from the report on An Post that it was only with regard to the sending of correspondence that the provision of the universal service offered An Post reputation enhancements. However, it is apparent from paragraphs 151 and 160 of the decision at issue that, if it were not entrusted with discharging the universal service obligation, Post Danmark would discontinue the distribution of letters since that service is unprofitable. Therefore, any loss of reputation limited to the letter post sector would not impact Post Danmark's situation even if it were not responsible for discharging the universal service obligation since Post Danmark would no longer be active in that sector.
- 69 For those reasons, the General Court held, in paragraph 149 of the judgment under appeal, that none of the points put forward by the appellants were capable of establishing that the fact that the Danish authorities did not take into account the enhancement of Post Danmark's brand image as a result of discharging the universal service obligation in the net avoided cost calculation should have given rise to doubts on the part of the Commission in the assessment of the compatibility with the internal market of the compensation for provision of the universal service 2017-2019.
- 70 None of the arguments raised by the appellants in support of their first ground of appeal, alleging an error of law and a distortion of the evidence as regards the alleged enhancement of Post Danmark's reputation is capable of succeeding.
- 71 In particular, it is necessary to reject the two arguments alleging errors of law and, in essence, a reversal by the General Court of the burden of proof and the existence of serious doubts on the sole basis that the Commission failed to undertake, in the decision at issue, an analysis of the possible enhancement of Post Danmark's reputation. First, it is not apparent from the judgment under appeal, nor is it alleged in support of the appeal, that the appellants had raised this point in their complaint lodged on 27 November 2017. Secondly, neither Annex I to Directive 97/67 nor the SGEI Framework oblige the Commission to include, in all circumstances, in a decision declaring an aid compatible with the internal market on the basis of Article 106(2) TFEU, specific reasoning concerning types of intangible benefits that it regards as non-existent.
- 72 Moreover, the arguments alleging that the universal service provided by Post Danmark is of a high quality and that the General Court could not rely, in order to

refute the enhancement of Post Danmark’s reputation following the attribution of the universal service obligation, on Post Danmark’s financial difficulties or the connections that consumers would make, in any event, between it and the Danish State, seek to call into question the General Court’s findings of fact.

- 73 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, the appraisal of those facts and evidence does not, save where they have been distorted, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal (see, to that effect, judgment of 26 September 2018, *Philips and Philips France v Commission*, C-98/17 P, not published, EU:C:2018:774, paragraph 40 and the case-law cited).
- 74 Therefore, since the appellants do not submit that the General Court’s appraisals as to the alleged enhancement of Post Danmark’s reputation linked to the attribution of the universal service obligation to the latter are vitiated by a distortion of the evidence, their arguments in that respect must be dismissed as being inadmissible.
- 75 The same applies to the arguments which, while formally alleging a distortion of the evidence, in fact criticise the conclusions that the General Court drew from the US Postal report and the report on An Post, summarised in paragraphs 67 and 68 of this judgment.
- 76 A distortion of the evidence 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. Furthermore, in accordance with Article 256 TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union and Article 168(1)(d) of the Rules of Procedure, an appellant must indicate precisely the evidence alleged to have been distorted by the General Court and show the errors of appraisal which, in its view, led to that distortion (judgment of 18 January 2017, *Toshiba v Commission*, C-623/15 P, not published, EU:C:2017:21, paragraph 54 and the case-law cited).
- 77 Contrary to the appellants’ submissions, paragraph 143 of the judgment under appeal, summarised in paragraph 67 of the present judgment, does not show any distortion of the extracted passage from page 24 of the US Postal report to which the appellants refer and according to which ‘the ability of the Postal Service and only the Postal Service to send and deliver mail to all consumers in the country pursuant to the [universal service obligation] enhances the value of the brand by differentiating it in a positive way from all others’. Likewise, the sole fact that the appellants relied, as they allege, on the report on An Post only by way of an example does not mean that the General Court could not refute the relevance of that example nor that, by so doing, it distorted the content of the report in question.

- 78 The arguments based on the alleged enhancement of Post Danmark's reputation linked to the attribution to it of the universal service obligation must therefore be dismissed as being inadmissible.

The alleged ubiquity of Post Danmark as an intangible benefit

– *Arguments of the parties*

- 79 The appellants submit that the General Court's assessments that, first, the services offered by Post Danmark did not require ubiquity, secondly, Post Danmark's financial situation ruled out the possibility that ubiquity would strengthen its reputation and, thirdly, that Post Danmark would offer certain services throughout the whole of the Danish territory even if it were not entrusted with the universal service obligation, are vitiated by a distortion of the evidence.

- 80 In particular, according to the appellants, the fact that the French operator, La Poste, did not enjoy any intangible benefit as a result of its ubiquity did not mean that Post Danmark did not enjoy such an advantage. The appellants add that the possibility for clients of distributors of catalogues, magazines and newspapers to select distributors that do not offer universal territorial coverage did not exclude that other clients of Post Danmark would prefer to select a distributor which was present throughout the Danish territory. It is, furthermore, precisely Post Danmark's ubiquity as a result of the discharge of the universal service obligation which meant that it was able to offer, throughout that territory, the distribution of parcels other than single-piece parcels, with or without home delivery depending on the area. Finally, according to the appellants, Post Danmark's financial difficulties do not affect the intangible benefits generated as a result of ubiquity.

- 81 The Commission and the Danish Government contest the admissibility and the merits of those arguments.

– *Findings of the Court*

- 82 By way of a premiss, the General Court found, in paragraph 151 of the judgment under appeal, that, in the postal sector, ubiquity attracts customers and increases the loyalty of customers, who are more inclined to choose the universal service provider than its competitors, since they know that, as a result of the universal service obligation, that provider offers services covering the entire national territory. In paragraph 154 of that judgment, the General Court found that an intangible benefit linked to ubiquity is not systematically deducted from the net avoided cost calculation, as evidenced by the 2010 WIK study, furnished by the appellants, which found that the universal service obligation did not confer that advantage on the French operator La Poste. In the present case, the General Court held, in paragraph 155 of the judgment under appeal, that the Commission had specifically stated, in paragraph 159(iii) of the decision at issue, that clients of distributors of catalogues, magazines and newspapers were fully prepared to select

distributors that did not offer universal territorial coverage. That finding, which the appellants do not dispute, tends to establish that Post Danmark does not enjoy, by virtue of its status as a universal service provider, an intangible benefit linked to ubiquity.

- 83 Moreover, the General Court found, in paragraph 157 of the judgment under appeal, in essence, that, according to paragraph 149(i) and paragraph 151 of the decision at issue, even if it had not been entrusted with the universal service obligation, Post Danmark's ubiquity would not have been fundamentally altered with regard to services connected with e-commerce given that it would have continued to offer, over the entire Danish territory, distribution of parcels other than single-piece parcels, with or without home delivery depending on the area.
- 84 It must be held that all of the arguments advanced by the appellants relating to the alleged ubiquity of Post Danmark as an intangible benefit seek, under cover of an alleged distortion of the evidence, to call into question the General Court's assessments of fact. The appellants merely either affirm that it cannot, despite the General Court's analysis, be excluded that Post Danmark enjoyed intangible benefits by virtue of its ubiquity, or that ubiquity as a result of the discharge of the universal service obligation allowed Post Danmark to provide certain services. The appellants do not however indicate the evidence which is alleged to have been distorted by the General Court, nor do they show the errors of analysis which are alleged to have led to that distortion. In those circumstances, and having regard to the case-law cited in paragraph 76 of this judgment, the appellants' arguments must be dismissed as being inadmissible.

The alleged lack of efficiency incentives

– *Arguments of the parties*

- 85 The appellants state that, taking into account Post Danmark's financial situation, the compatibility with the internal market of any aid whose object was the universal service obligation should have been assessed, in accordance with paragraph 9 of the SGEI Framework, having regard to the Guidelines on State aid for rescuing and restructuring, which require a restructuring plan to be prepared. The efficiency incentives introduced by the Danish authorities could therefore only have been accepted if they had been part of a restructuring plan approved under those guidelines. Consequently, by holding, in essence, in paragraphs 162 to 164 of the judgment under appeal, that the Commission could validly consider, in the decision at issue, without it giving rise to serious difficulties for that institution as to the compatibility with the internal market of the compensation for provision of the universal service 2017-2019, that the Danish authorities had introduced sufficient incentives for the efficient provision of the universal service, the General Court infringed the SGEI Framework.
- 86 The Commission and the Danish Government contest the admissibility and the merits of those arguments.

– *Findings of the Court*

- 87 It must be borne in mind that, in accordance with the second sentence of Article 170(1) of the Rules of Procedure, the subject matter of the proceedings before the General Court may not be changed in the appeal. To allow a party to put forward for the first time before the Court of Justice pleas and arguments which it did not raise before the General Court would be to authorise it to bring before the Court of Justice a case of wider ambit than that which came before the General Court. In an appeal, the jurisdiction of the Court of Justice is thus confined to examining the assessment by the General Court of the pleas and arguments aired before it (judgment of 27 April 2017, *Akzo Nobel and Others v Commission*, C-516/15 P EU:C:2017:314, paragraph 38 and the case-law cited).
- 88 In the present case, as stated in paragraph 160 of the judgment under appeal, as regards taking into account efficiency incentives, the appellants submitted before the General Court that the net avoided cost calculation in connection with the discharge of the universal service obligation breached paragraphs 39 to 43 of the SGEI Framework in two respects. First, that calculation was not carried out on the basis of an efficient service provider and, secondly, it would not have been possible to verify the quality of the universal service since the compensation for provision of the universal service 2017-2019 was, in part, paid *ex post*.
- 89 In paragraphs 164 to 166 of the judgment under appeal, the content of which is summarised in paragraph 44 of the present judgment, the General Court held, in essence, that the appellants' arguments were based on confusion between, first, efficiency incentives as required under paragraphs 39 to 43 of the SGEI Framework and, secondly, the idea that the net avoided cost must be calculated on the basis of an efficient service provider.
- 90 As stated in paragraph 85 of this judgment, the appellants submit, in support of their first ground of appeal, that the Commission's assessment on the efficiency incentives should have been based on the Guidelines on State aid for rescuing and restructuring.
- 91 However, as the Commission and the Danish Government point out, the appellants did not raise that complaint before the General Court, with the result that the arguments based on the Guidelines on State aid for rescuing and restructuring are new and must, for that reason, be dismissed as being inadmissible in accordance with the second sentence of Article 170(1) of the Rules of Procedure.
- 92 It follows that the first ground of appeal must be dismissed as being inadmissible.

The second ground of appeal, alleging that the General Court erred in law and distorted the evidence in respect of the costs arising from the dismissal of former civil servants of Post Danmark

Arguments of the parties

- 93 The appellants submitted before the General Court that the Commission could not, in accordance with the SGEI Framework, declare an aid for the provision of a universal service to be compatible whilst authorising its payment for a different purpose, namely, in the present case, to cover the costs of dismissing the former civil servants of Post Danmark. In such a situation, the Commission would in fact be authorising the misuse of aid, the compatibility of which with the internal market should have, in view of the financial situation of Post Danmark, been assessed in the light not of the SGEI Framework but of the Guidelines on State aid for rescuing and restructuring. By rejecting those arguments, the General Court disregarded the fact that, under the SGEI Framework, the financing of universal services does not include the costs of making redundant the personnel of an undertaking in difficulty and also infringed the principle of equal treatment, which prohibits the more favourable treatment of public undertakings, and the principle of legitimate expectations. In any event, they submit that the General Court distorted the evidence since it was not all the former civil servants of Post Danmark who were in fact involved in the provision of the universal service. Accordingly, the fact that the Danish authorities also took into account the redundancy costs in the counterfactual scenario does not remedy the error committed and leads to legal uncertainty.
- 94 The Commission and the Danish Government contest the merits of this ground of appeal.

Findings of the Court

- 95 The appellants state that, by the second ground of appeal, they do not criticise the General Court's finding, set out *inter alia* in paragraphs 170 and 173 of the judgment under appeal, that the compatibility with the internal market of an aid granted for the purpose of the discharge of universal service obligations does not depend on the actual allocation of the corresponding amount. The appellants submit that they do criticise, however, the grounds of the judgment under appeal set out in paragraphs 176 to 178 thereof, according to which the Commission may declare an aid to be compatible with the internal market for the purposes of the provision of a universal service whilst authorising the same aid in order to meet a different objective, namely the dismissal of members of staff in the context of a restructuring of the beneficiary undertaking. According to the appellants, that approach amounts, furthermore, to authorising the misuse of an aid.
- 96 At the outset, the argument alleging a purported authorisation of a misuse of the compensation for provision of the universal service 2017-2019 must be rejected. As is clear from Article 1(g) of Regulation 2015/1589, aid is misused when it is

used by the beneficiary in contravention of the decision by virtue of which that aid is declared compatible with the internal market. It follows that a Commission decision declaring an aid to be compatible with the internal market cannot, by definition, be regarded as authorising, at the same time, the misuse of that aid, within the meaning of Article 1(g) of Regulation 2015/1589.

- 97 As regards the remainder of the argument submitted by the appellants, it should be borne in mind that, in accordance with Article 106(2) TFEU, undertakings entrusted with the operation of services of general economic interest are to be subject to the rules contained in the Treaties and, in particular, to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them, and that the development of trade must not be affected to such an extent as would be contrary to the interests of the European Union.
- 98 Thus, exemptions to the FEU Treaty rules are permitted provided that they are necessary for performance of the particular tasks assigned to an undertaking entrusted with the operation of a service of general economic interest (judgment of 8 March 2017, *Viasat Broadcasting UK v Commission*, C-660/15 P EU:C:2017:178, paragraph 29 and the case-law cited).
- 99 In that context, paragraph 1 of the SGEI Framework states that financial support from the public authorities may prove necessary where revenues accruing from the provision of the service do not allow the costs resulting from the public service obligation to be covered. According to paragraph 21 of the SGEI Framework, the amount of financial support granted by way of compensation for discharging the public service must not exceed what is necessary to cover the net cost of discharging public service obligations, including a reasonable profit.
- 100 The appellants' line of argument must be understood as amounting to the submission, in essence, that the General Court's reasoning, which led it to hold that the taking into account of the costs of dismissing the former civil servants of Post Danmark in the net avoided cost calculation was not a factor that should have led the Commission to find that there were serious difficulties within its assessment, is vitiated, principally, by an error of law and, subsidiarily, a distortion of the evidence.
- 101 In that regard, in paragraphs 9 and 10 of the judgment under appeal, as summarised in paragraphs 15 and 16 of this judgment, the General Court found that the implementation of Post Danmark's new production model involved the dismissal of its former civil servants, which led to the payment of special redundancy payments, financed, in part, by means of the compensation for provision of the universal service 2017-2019, whereas Post Danmark had already been entrusted with discharging the universal service obligation. Thus, in paragraph 168 of the judgment under appeal, the General Court recalled, referring to paragraph 23 of the decision at issue, that that compensation constituted, on that basis, a component of Post Danmark's new production model.

- 102 In addition, in paragraph 178 of the judgment under appeal, the General Court found that it was apparent from paragraphs 1 and 10 of the agreement of 20 October 2017 and from paragraph 2(2) of the decision at issue that the creation of a new production model within Post Danmark had been made necessary by the change in the nature of the postal market due to the increased use of electronic communications in Denmark. The General Court also stated that that new model was largely focused on the rationalisation of certain personnel costs associated with mail delivery, which constitute, as is clear from paragraph 2 of the universal service entrustment, reproduced in paragraph 4 of the judgment under appeal and in paragraph 12 of the present judgment, a central activity of the universal service obligation.
- 103 It is apparent from the General Court's findings that the dismissal of the former civil servants of Post Danmark constitutes a parameter for the discharge of the universal service obligation through a net cost taking into account the costs relating to those redundancies.
- 104 In those circumstances, it must be held that the General Court did not err in law in deciding, in essence, in paragraph 178 of the judgment under appeal, that the costs of dismissing the former civil servants of Post Danmark was intrinsically linked with the discharge of the universal service obligation, such that they could duly be taken into account for the purposes of the calculation of the net cost necessary for the purposes of discharging that obligation. In that regard, it should be added that the appellants do not devote any of their analysis to the impact that retaining in employment the former civil servants of Post Danmark would have had on the net cost necessary for discharging the universal service obligation.
- 105 It follows that the General Court established to the requisite legal standard the link between the dismissal of the former civil servants of Post Danmark and the related costs, on the one hand, and the discharge of the universal service obligation, on the other hand, with the result that the taking into account of the costs in question for the purposes of the net avoided cost calculation does not constitute an infringement of the SGEI Framework or, consequently, the principles of equal treatment and of legitimate expectations.
- 106 In addition, the General Court also found, in paragraph 178 of the judgment under appeal, that, as the Commission had stated without being contradicted by the appellants on that point, that the Danish authorities had adopted, in the counterfactual scenario, a cautious approach according to which, even if it were not entrusted with the universal service obligation, Post Danmark would still have had to pay the costs of dismissing the former civil servants in the same amount as that provided for in the factual scenario. As the General Court observed in the same paragraph of the judgment under appeal, that approach reduced the impact of those redundancy costs on the amount of the net avoided cost.
- 107 The appellants submit that, by that ground, the General Court sought to remedy the error of law that resulted from taking into account the costs of dismissal of the

former civil servants of Post Danmark in the calculation of the net avoided cost. However, as is clear from paragraph 105 of the present judgment, the General Court did not err in law in that respect, with the result that that argument must also be rejected.

- 108 In the absence of an infringement of the SGEI Framework owing to the taking into account of the costs of dismissing the former civil servants of Post Danmark, the appellants' argument alleging that the compatibility of any aid intended to cover the costs in question should have been assessed in the light not of that framework but rather of the Guidelines on State aid for rescuing and restructuring must itself also be rejected.
- 109 Finally, assuming, as the appellants submit in support of their argument alleging a distortion of the evidence, that it is not stated in the agreement of 20 October 2017 that all the former civil servants of Post Danmark were involved in mail delivery, it remains the case that the General Court did not find, in the judgment under appeal, that such a fact was apparent from the agreement in question.
- 110 The second ground of appeal must therefore be rejected as being unfounded.

The third ground of appeal, alleging that the General Court erred in law as regards the classification of the state guarantee at issue as an 'existing aid'

Arguments of the parties

- 111 According to the appellants, by finding that the state guarantee at issue was not part of a multiannual aid scheme in the context of which the limitation period began to run each year, the General Court infringed Article 1(d) of Regulation 2015/1589. In any event, the application of that guarantee was periodic and automatic and had the effect of improving the financial situation of Post Danmark. The General Court therefore erred in law in finding that that guarantee was an individual measure which was not part of an aid scheme.
- 112 The Commission and the Danish Government contest the admissibility and the merits of this ground of appeal.

Findings of the Court

- 113 As regards the state guarantee at issue, the General Court recalled, in paragraph 200 of the judgment under appeal, that it was granted by Paragraph 9 of Law No 409 on Post Danmark, referred to in paragraph 54 of the present judgment. In paragraphs 201 to 208 of that judgment, the General Court rejected the appellants' line argument, which considered that that guarantee constituted an aid scheme, since that line of argument was based on confusion between, on the one hand, advantages granted on a periodic basis, pursuant to the repeated individual application of an aid scheme and, on the other hand, the grant of an individual guarantee which might have the effect of continuously improving the

situation of the beneficiary. In the latter case, the date on which the aid was granted was the date on which the guarantee was adopted. As is stated in paragraph 210 of the judgment under appeal, it is therefore without erring in law that the Commission determined that the starting point of the limitation period relating to any aid that may have been granted by means of the state guarantee at issue was the date of its adoption, namely 6 June 2002.

- 114 The General Court added in essence, in paragraphs 216 to 219 of the judgment under appeal, that, since that guarantee could only be implemented in the event of bankruptcy, that is to say the cessation of Post Danmark's activity, and covers only the costs of dismissing the employees who entered into service before 2002, it was not, in any event, of such a nature as to improve Post Danmark's situation. In addition, the General Court observed that it was not apparent from the case file before it that the state guarantee at issue exempts Post Danmark from regular contributions which its competitors are required to pay in order to ensure redundancy payments in the event of bankruptcy, or even that its regular personnel costs are reduced as a result of that guarantee. In those circumstances, the state guarantee at issue conferred, above all, an advantage on the former civil servants who became employees of Post Danmark at the time of its transformation into a limited liability company, since such employees have the assurance, in the event of Post Danmark's bankruptcy, of receiving their full special redundancy payments.
- 115 In that regard, by finding, in paragraphs 216 to 219 of the judgment under appeal, that the fact that the state guarantee at issue could only be implemented in the event of Post Danmark's bankruptcy, and for the benefit of a certain category of workers who were already employed in 2002, excluded the possibility of regarding it as granting a competitive advantage to Post Danmark, the General Court did not make an error of law. It was also without erring in law that the General Court found that, if that guarantee did not reduce the costs that Post Danmark had to bear so long as it remained active, whether those costs were social security contributions or regular personnel costs, it did not confer any competitive advantage to Post Danmark within the meaning of Article 107(1) TFEU.
- 116 Since there is no error of law in the reasoning that the state guarantee at issue does not confer a competitive advantage, within the meaning of Article 107(1) TFEU, the appellants' arguments alleging that that guarantee constitutes an aid which is not an existing aid, within the meaning of Article 17(3) of Regulation 2015/1589, rest on an incorrect premiss and must be rejected as being unfounded.
- 117 It follows that the third ground of appeal must be rejected as being unfounded.

The fourth ground of appeal, alleging that the General Court erred in law and distorted the evidence as regards the accounting allocation of common costs

Arguments of the parties

- 118 The appellants submit that the 2006 and 2011 accounting regulations required the allocation of all of the common costs to the accounts relating to the universal service, even if some of those costs were not connected with that service. Those national regulations are therefore contrary to Article 14(3)(b)(iv) of Directive 97/67, which requires an appropriate allocation of common costs. Therefore, it is at the cost of distorting the 2006 and 2011 accounting regulations that the General Court decided that they were compatible with Article 14(3)(b)(iv) of Directive 97/67. It was only from 2014, following an amendment to the accounting regulation, that Post Danmark began to carry out the appropriate allocation of the common costs. That legislative amendment had the result of an accounting transfer of costs in the order of 4.2% to accounts not connected with the universal service. Thus, by holding that the appellants had not shown that Post Danmark had systematically attributed common costs to accounts relating to the discharge of the universal service obligation, the General Court, first, distorted the evidence and, secondly, disregarded the fact that it was for the Commission and not the appellants to investigate that matter.
- 119 Moreover, the General Court distorted the evidence in finding that the appropriate allocation of common costs was supported by the fact that Post Danmark's accounts had been subject to regular audits by a State-authorized public accountant and the national regulatory authority. First, the audits in question were made with the purpose of checking that the allocation complied with the accounting regulation, which was however contrary to Article 14 of Directive 97/67. Secondly, the Danish Court of Auditors put the reliability of those checks in issue on the ground that the costs relating to sales, sorting, transport and distribution were attributed, in the main part, to the universal service, whereas the operations that were the object of that service represented less than half the total costs in question.
- 120 The Commission and the Danish Government contest the admissibility and the merits of this ground of appeal.

Findings of the Court

- 121 By their line of argument, the appellants criticise the grounds of the judgment under appeal set out in paragraphs 290 to 296 thereof. Those grounds address the claim, made by the appellants in support of their action at first instance, that the relevant provision of Article 4(3)(c) of the 2011 accounting regulation, which was identical to Article 4(4)(c) of the 2006 accounting regulation, required Post Danmark to allocate all common costs to costs solely relating to the universal service. That indicated that there was a cross-subsidy under the universal service

mandate, which, as it involved State resources and conferred an advantage, constituted State aid, within the meaning of Article 107(1) TFEU.

- 122 As is apparent from paragraphs 282 and 283 of the judgment under appeal, the Commission had rejected that line of argument in paragraphs 196 to 198 of the decision at issue on the ground that the 2006 and 2011 accounting regulations did not require Post Danmark to attribute all of the common costs to the costs solely relating to the universal service and that, in any event, the practice described by the appellants was not attributable to the State, did not involve State resources and did not confer an advantage on Post Danmark.
- 123 In view of those assessments, the General Court rejected the appellants' claim on the ground that the 2006 and 2011 accounting regulations did not require or even permit Post Danmark to attribute all of the common costs to costs solely relating to the universal service.
- 124 In particular, in support of that decision, the General Court reproduced, in paragraph 288 of the judgment under appeal, the text of Article 4(3) of the 2011 accounting regulation, applied to Post Danmark. As set out there, that provision reads as follows:
- '(a) Costs that are incremental in relation to a specific service shall be allocated to that service. This applies to both variable and fixed costs.
 - (b) Costs that cannot be attributed to a specific service shall, whenever possible, be allocated to a group of services based on a direct analysis of the origin of the costs themselves (attributable common costs).
 - (c) When determining the cost allocation under 4(3)(a) and (b), the costs necessary to provide the universal service obligation shall be allocated to each of the services covered by the universal service obligation or to a group of services covered by the universal service obligation.
 - (d) Costs that cannot be allocated on the basis of a direct analysis (non-attributable common costs) shall be allocated to the groups of services concerned on the basis of an indirect link with another cost category or another group of cost categories for which it is possible to carry out direct orientation or separation. Such an indirect link must be based on comparable cost structures.
 - (e) In the case of non-attributable common costs for which there is no direct or indirect method for allocating costs, the cost categories shall be allocated on the basis of a general allocation key calculated by using the ratio of all costs directly or indirectly assigned or allocated, on the one hand, to each of the services covered by the universal services and, on the other hand, to the other services.

- (f) The common costs that are necessary for the provision of both universal and non-universal services (non-attributable common costs), shall be appropriately distributed. The same costs drivers must be applied to both universal services and non-universal services.’

- 125 In paragraph 289 of the judgment under appeal, the General Court added that Article 4(3)(a) to (e) of the 2011 accounting regulation was identical to Article 4(4)(a) to (e) of the 2006 accounting regulation.
- 126 In paragraph 292 of that judgment, the General Court found that it was not apparent either from the wording of Article 4(4)(c) of the 2006 accounting regulation or from that of Article 4(3)(c) of the 2011 accounting regulation that those provisions had required or even allowed Post Danmark to allocate all common costs to the costs solely incurred for the discharge of the universal service obligation. As regards the common costs, the principle established in those provisions was, according to the General Court, allocation on the basis of a direct analysis of their origin.
- 127 In that context, in paragraph 293 of the judgment under appeal, the General Court adopted the precision provided by the Kingdom of Denmark in the context of a measure of organisation of procedure, according to which Article 4(4)(c) of the 2006 accounting regulation and Article 4(3)(c) of the 2011 accounting regulation constituted a clarification of the manner in which the costs were to be recorded in Post Danmark’s internal accounts after they had been allocated to the discharge of the universal service obligation. In particular, according to the General Court, those provisions, called into question by the appellants, merely stated that when costs were allocated to the universal service obligation on the basis of the incremental cost method, those costs had to be attributed, within that obligation, to the relevant service, in accordance with the rule laid down in Article 4(4)(a) of the 2006 accounting regulation and Article 4(3)(a) of the 2011 accounting regulation, or to the relevant group of services, in accordance with the rule laid down in Article 4(4)(b) of the 2006 accounting regulation and Article 4(3)(b) of the 2011 accounting regulation. In other words, Article 4(4)(c) of the 2006 accounting regulation and Article 4(3)(c) of the 2011 accounting regulation simply constituted a specific application, within accounts concerning a universal service obligation, of the principles laid down in subparagraphs (a) and (b) of those provisions.
- 128 The General Court found, in paragraph 295 of the judgment under appeal, that the appellants merely submitted that, following the adoption, in 2014, of a new national accounting regulation which included the exact wording of Article 14(3) of Directive 97/67, the costs associated with discharging the universal service obligation had decreased in comparison with the previous year, whereas the costs associated with Post Danmark’s other activities had increased. The General Court considered however that, in addition to the fact that it was based on a mere assertion by the appellants, the existence of a variation in the allocation of the various costs from one year to the next could not, in itself, be sufficient for it to be

presumed that, during the preceding period, common costs were systematically allocated to the costs associated with discharging the universal service obligation.

- 129 As is apparent from paragraph 297 of the judgment under appeal, the appellants therefore had not established that the Commission had been confronted with serious difficulties which should have given rise to the initiation of the formal investigation procedure, when it ruled out the possibility that the national accounting regulation applicable to Post Danmark between 2006 and 2013 resulted in the existence of State aid, on the basis, principally, that there was no evidence of any irregularity in the allocation of common costs.
- 130 Contrary to the appellants' submissions, it is apparent from the wording of Article 4(3) of the 2011 accounting regulation, reproduced in paragraph 124 of this judgment, that, as the General Court found in paragraph 292 of that judgment, that provision of national law did not require, or even allow, the allocation of all of the common costs to costs solely incurred for the provision of the universal service obligation.
- 131 First, a comparison of the national accounting regulation applicable to Post Danmark with Article 14(3) of Directive 97/67 reveals, first, that Article 4(3)(a) of the 2011 accounting regulation corresponds to Article 14(3)(a) of Directive 97/67 and, secondly, that Article 4(3)(b) and (d) to (f) of that accounting regulation corresponds, respectively, to Article 14(3)(b)(i) to (iv) of Directive 97/67.
- 132 Secondly, it is true that Article 14(3)(b) of Directive 97/67 does not contain a provision which corresponds to that of Article 4(3)(c) of the 2011 accounting regulation, nor to that of Article 4(4)(c) of the 2006 accounting regulation, those two provisions being identical, as is clear from the finding made by the General Court in paragraph 289 of the judgment under appeal, which is not called into question by the appellants in this appeal. However, that does not affect in any way the conclusion reached by the General Court.
- 133 Contrary to the appellants' submissions, those two provisions of national law do not correspond to Article 14(3)(b)(iv) of Directive 97/67, that latter provision corresponding to Article 4(3)(f) of the 2011 accounting regulation. It follows that the comparison between the wording of Article 4(3)(c) of the 2011 accounting regulation and of Article 14(3)(b)(iv) of Directive 97/67, on which the appellants base their line of argument alleging the incorrect transposition of Directive 97/67 into Danish law, is based on an incorrect premiss.
- 134 Consequently, neither the General Court's assessment reproduced in paragraph 127 of the present judgment, nor the conclusion that it reached on the basis of that reasoning, reproduced in paragraph 129 of the present judgment, were vitiated by a distortion of the 2006 and 2011 accounting regulations or by an infringement of Directive 97/67. The appellants' arguments to the contrary must therefore be rejected as being unfounded.

- 135 It is also necessary to reject the appellants' argument alleging that, by basing its assessment on the fact that Post Danmark's accounts had been subject to regular auditing by the State-authorized public accountant and by the national regulatory authority, the General Court had distorted the evidence. That argument seeks to call into question the reliability of those checks on the ground that they were carried out in application of the 2006 and 2011 accounting regulations, which were contrary to Directive 97/67. As is apparent from paragraphs 130 to 134 of the present judgment, those regulations were not contrary to Directive 97/67.
- 136 In the same context, the appellants submitted before the General Court that the amendment of the 2011 accounting regulation, which occurred in 2013, had the consequence, with effect from 2014, of an accounting transfer of costs, in the order of 4.2%, to accounts not associated with the universal service. In support of the appeal, the appellants submit that, in rejecting that claim, the General Court distorted the evidence.
- 137 However, the General Court's assessment that the existence of a variation in the allocation of the various costs from one year to the next, could not, in itself, be sufficient for it to be presumed that, during the preceding period, common costs were systematically allocated to the costs associated with the discharge of the universal service obligation constitutes a purely factual assessment. It follows that, save where there is a distortion, that assessment cannot be the object of review by the Court of Justice at the stage of this appeal. It suffices to observe that the appellants do not indicate precisely the evidence that is alleged to have been distorted by the General Court nor show the analytical errors that led it to distort the evidence, with the result that their argument must be rejected.
- 138 It is necessary, lastly, to reject the claim alleging a distortion by the General Court of the 2006 and 2011 accounting regulations based on a report of the Danish Court of Auditors. That report is relied on by the appellants for the first time in the context of the present appeal with the result that, in view of the fact that it is new, that argument must be rejected as being inadmissible, pursuant to Article 170(1), second sentence, of the Rules of Procedure and in accordance with the case-law cited in paragraph 87 of the present judgment.
- 139 The fourth ground of appeal must therefore be rejected as being in part inadmissible and in part unfounded.
- 140 Since none of the grounds of appeal put forward by the appellants in support of their appeal is capable of succeeding, the appeal must be dismissed in its entirety.

Costs

- 141 In accordance with Article 184(2) of the Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to costs. In accordance with Article 138(1) of those rules, which applies 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.

- 142 In the present case, as the Commission has applied for costs against the appellants and the appellants have been unsuccessful, they must be ordered to bear their own costs and to pay those incurred by the Commission.
- 143 Pursuant to Article 140(1) of the Rules of Procedure, also applicable to appeal proceedings by virtue of Article 184(1) of those rules, the Member States which intervene in the proceedings are to bear their own costs. Accordingly, the Kingdom of Denmark is to bear its own costs.
- 144 In accordance with Article 140(3) of the Rules of Procedure, the Court may order an intervener to bear its own costs. Pursuant to that provision, Post Danmark is to bear its own costs.

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

1. **Dismisses the appeal;**
2. **Orders ITD, Brancheorganisation for den danske vejgodstransport A/S and Danske Fragtmænd A/S to bear, in addition to their own costs, those incurred by the European Commission;**
3. **Declares that the Kingdom of Denmark and Post Danmark are to bear their own costs.**

Gratsias

Ilešič

Jarukaitis

Delivered in open court in Luxembourg on 10 November 2022.

A. Calot Escobar

D. Gratsias

Registrar

President of the Chamber