Reports of Cases

OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 15 July 2021 [1]

Joined Cases C-167/19 P and C-171/19 P

European Commission
v
Freistaat Bayern (C-167/19 P)
Interessengemeinschaft privater Milchverarbeiter Bayerns eV,
Genossenschaftsverband Bayern eV,

Verband der Bayerischen Privaten Milchwirtschaft eV (C-171/19 P)

(Appeal – State Aid – Aid in favour of the Bavarian dairy sector – Funding of milk-quality tests – Decision declaring the aid to be incompatible with the internal market – Opening decision – the Commission's obligations – Rights of the Member State concerned – Rights of the interested parties to be involved in the administrative procedure – Infringement of essential procedural requirements)

1. By these two appeals, the European Commission seeks to have the judgments of the General Court in *Freistaat Bayern* v *Commission* [2] and in *Interessengemeinschaft privater Milchverarbeiter Bayerns and Others* v *Commission* [3] set aside. In those judgments, the General Court allowed the actions of Freistaat Bayern (Free State of Bavaria; 'the *Land* of Bavaria') and of the Interessengemeinschaft privater Milchverarbeiter Bayerns and Others ('the interest grouping'), seeking partial annulment of Commission Decision (EU) 2015/2432. [4]

I. Background to the disputes

2. The background to the disputes is described in paragraphs 1 to 21 of the first judgment under appeal and paragraphs 1 to 20 of the second judgment under appeal. I will limit myself to pointing out the following elements.

3. In Germany, the quality of milk has traditionally been guaranteed by independent quality tests. Those quality tests are funded, in Bavaria (Germany), first, by resources from the milk levy imposed on milk buyers and, secondly, from the general budget of the *Land* of Bavaria, one of the defendants in the present appeals.

1 Original language: English.

2 Judgment of 12 December 2018 (T-683/15, EU:T:2018:916; 'the first judgment under appeal').

3 Judgment of 12 December 2018 (T-722/15 to T-724/15, not published, EU:T:2018:920; 'the second judgment under appeal').

4 Decision of 18 September 2015 concerning State aid SA.35484 (2013/C) (ex SA.35484 (2012/NN)) granted by Germany in respect of milk quality tests pursuant to the Milk and Fat Law (OJ 2015 L 334, p. 23; 'the contested decision').

4. By letter of 17 July 2013, the Commission informed the Federal Republic of Germany that it had decided to initiate the procedure laid down in Article 108(2) TFEU ('the opening decision'). That decision concerns various measures implemented in several German *Länder* under the 1952 Gesetz über den Verkehr mit Milch, Milcherzeugnissen und Fetten (German Federal Law on Milk and Fats)[5] in order to support the dairy sector, including the aid referred to in the contested decision. With regard to that aid, the Commission, on the one hand, in paragraph 2.5 of the opening decision, regarding the financing of the measures being assessed, cited Paragraph 22 of the MFG, which concerns the milk levy. On the other hand, in recital 264 of that decision, the Commission stated that the measures being assessed were financed by means of a parafiscal levy, referring to the same provision of the MFG.

5. The Commission found that the aid at issue was compatible with the internal market during the period from 28 November 2001 to 31 December 2006, while expressing doubts as to its compatibility with the internal market as from 1 January 2007.

6. By letter dated 20 September 2013, the Federal Republic of Germany submitted comments concerning the opening decision. The Commission received seven comments from interested parties that referred to the measures concerning milk-quality tests covered by the contested decision. The comments received were sent to the Federal Republic of Germany, which then responded to additional observations submitted on 8 July 2014.

7. On 18 September 2015, the Commission adopted the contested decision. The decision concerns exclusively the funding of milk-quality tests carried out from 1 January 2007 in Baden-Württemberg (Germany) and Bavaria.

8. In the first place, the Commission examined whether the resources obtained from the milk levy constituted State aid within the meaning of Article 107(1) TFEU. In addition, points 1 to 6 of Paragraph 22(2) of the MFG stipulated the purposes for which milk-levy resources could be used. Consequently, the Commission considered that the resources from the milk levy should be regarded as being under State control and the measures funded by the resources from the milk levy were granted through State resources and were attributable to the State.

9. In the second place, the Commission found that the dairies in Bavaria obtained a selective advantage as a result of being refunded the costs of milk-quality tests from resources from the levy and the general budget of the *Land* of Bavaria. The Commission found that those milk-quality tests were, ultimately, of benefit to dairies because they were required by law to test the milk delivered to them. The dairies were undertakings within the meaning of Article 107(1) TFEU and the costs relating to the payment made to a testing body for the purposes of milk-quality tests had to be regarded as typical operating costs which the undertakings in question, namely the dairies, normally had to bear themselves.[6] Moreover, according to the Commission, any possible advantage was granted only to 'certain undertakings' because, other than the dairy sector, many other economic sectors in Germany did not benefit from the measures in question. The possible advantage being conferred was therefore selective. Furthermore, in *Länder* other than Baden-Württemberg and Bavaria, dairies were not refunded those costs from milk-levy resources. Finally, in recital 145 of the contested decision, the Commission took account of the fact that the measure was also funded from the general budget of the *Land* of Bavaria. Consequently, in its view, the benefit which the dairies derived from the

[5] BGBl. 1952 I, p. 811; 'the MFG'.

[6] See, in relation to a parallel case of tests of transmissible spongiform encephalopathies in bovine animals, judgment of 30 June 2016, *Belgium* v *Commission* (C-270/15 P, EU:C:2016:489).

costs of the milk-quality tests being borne did not necessarily correspond to the amount they had paid in respect of the milk levy. It transposed that finding to the funding received from the general budget of the *Land* of Bavaria.

10. In the third place, as regards the presence of existing aid, the Commission found that, with the exception of the MFG, which did not establish the aid scheme in question, the German authorities had not submitted any information demonstrating that a legal basis adopted before 1958 was still applicable in its original version during the period of investigation.

11. In the fourth and last place, the Commission found that the aid towards routine controls of milk did not meet the conditions of paragraph 109 of the Community guidelines for State aid in the agriculture and forestry sector 2007 to 2013 (OJ 2006 C 319, p. 1), read in conjunction with Article 16(1) of Commission Regulation (EC) No 1857/2006,[7] to which paragraph 109 refers.

12. In those circumstances, the Commission decided, in Article 1 of the contested decision, that the aid granted since 1 January 2007 in Bavaria was unlawful and incompatible with the internal market. In Articles 2 to 4 of that decision, the Commission ordered the recovery of the aid and set out the detailed rules for that recovery.

II. Proceedings before the General Court and the judgments under appeal

13. On 26 November 2015 and on 4 December 2015 respectively, the *Land* of Bavaria and the interest grouping brought actions seeking partial annulment of the contested decision.

14. In particular, the first plea of both the *Land* of Bavaria and of the interest grouping alleged an infringement of Article 108(2) TFEU and of Article 6(1) and Article 20(1) of Regulation No 659/1999.[8]

15. The second plea of the interest grouping alleged an infringement of Article 107(1) TFEU in so far as the resources from the milk levy were considered to constitute State resources.

16. In the judgments under appeal, in relation to the first plea of the applicants, first, the General Court noted that, in accordance with Article 6(1) of Regulation No 659/1999, the opening decision must summarise the relevant issues of fact and law, include a preliminary assessment of the Commission and set out the doubts entertained by the Commission as to the compatibility of the measure at issue with the internal market, without rendering meaningless the right of interested parties to submit their comments.

17. Secondly, the General Court examined the contested decision in the light of the opening decision in order to determine whether the funding using resources from the general budget of the *Land* of Bavaria was already included in the opening decision. It found that the funding of milk-quality tests using the *Land* of Bavaria's budgetary resources was not mentioned in the opening decision. It pointed out, in the second judgment under appeal, that the Commission had not asserted that that funding was mentioned explicitly in the opening decision. Therefore, the

[7] Regulation of 15 December 2006 on the application of Articles [107 and 108 TFEU] to State aid to small and medium-sized enterprises active in the production of agricultural products and amending Regulation (EC) No 70/2001 (OJ 2006 L 358, p. 3).

[8] Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1) (also called 'the Procedural Regulation').

General Court found that the interested parties could presume legitimately that the Commission's examination contained in the opening decision concerned only the resources from the milk levy.

18. Thirdly, the General Court pointed out that the term 'State resources', used in Article 107(1) TFEU, had a very broad sense since it provides that any aid granted through such resources 'in any form whatsoever' is incompatible with the internal market. Consequently, those resources may take various forms and, therefore, the Commission must identify them and analyse them carefully. In addition, it noted that State resources are one of the constituent elements of the classification as aid. In that regard, even though the expression 'financial support', used by the Commission in the opening decision, might be interpreted as referring to both sources of funding, it must be considered to be insufficiently precise. The General Court added that, admittedly, the final decision may contain certain differences with respect to the opening decision. However, such a difference is not justified in the present case. As the Commission acknowledged, it was informed by the Member State of the funding using resources from the general budget of the *Land* of Bavaria long before the opening decision was adopted. Moreover, the General Court noted that, in the contested decision, the Commission expressly referred to the funding of the aid from resources from the general budget of the *Land* of Bavaria, thereby acknowledging that that form of funding was not an irrelevant factor in its analysis. The General Court concluded that the contested decision had been adopted without giving the interested parties the opportunity to comment on the funding using resources from the general budget of the *Land* of Bavaria.

19. Therefore, the General Court concluded that the contested decision was adopted in breach of the applicants' right to be involved in the administrative procedure and, therefore, of Article 108(2) TFEU and of Article 6(1) of Regulation No 659/1999. It also ruled that the obligation on the Commission to place the interested parties in a position, at the stage of the opening decision, to put forward their comments is in the nature of an essential procedural requirement, the infringement of which has consequences, such as the annulment of the defective act, irrespective of whether that infringement caused harm to the person pleading it or whether the administrative procedure might have led to a different result. Therefore, it upheld the first plea.

20. For the sake of completeness, the General Court held that it cannot be ruled out that, in the absence of the procedural failure found, that is, if the applicant had actually had an opportunity during the formal investigation procedure to submit its comments on the funding from its general budget, the procedure might have led to a different result. It pointed out in this respect, in particular, that the contested decision does not put forward a separate analysis in respect of each of the two funding methods. The General Court took the view that, in the contested decision, the Commission either carried out an analysis without referring to the funding method concerned, or transposed its reasoning on the funding using the milk levy to its reasoning on the funding from the general budget of the *Land* of Bavaria. It was therefore possible that, had the arguments relating to the funding from the general budget of the *Land* of Bavaria been put forward during the formal investigation procedure, they might have led to a different outcome.

21. Without ruling on the other pleas raised by the applicants, the General Court annulled Articles 1 to 4 of the contested decision in so far as they declare that the grant by the Federal Republic of Germany of State aid is incompatible with the internal market in respect of the milk-quality tests carried out in Bavaria and order recovery of that aid.

III. Assessment

22. The Commission puts forward four grounds of appeal.

A. First ground of appeal, alleging an error of law in the interpretation and application of Article 108(2) TFEU and Article 6(1) of Regulation No 659/1999

1. Admissibility

23. The *Land* of Bavaria and the interest grouping submit, in essence, that the first grounds of appeal of the Commission in its appeals are inadmissible, as they seek to contest factual assessments carried out by the General Court, without alleging any distortion of facts or evidence.

24. First, the *Land* of Bavaria contends that the Commission does not complain that the General Court infringed Article 6(1) of Regulation No 659/1999, but rather alleges that the General Court interpreted erroneously the opening decision.

25. Secondly, the *Land* of Bavaria submits that, contrary to the Commission's submissions, as set out in paragraphs 60, 61 and 65 of the first judgment under appeal, the General Court did not hold that the Commission had a positive obligation to describe the precise funding method of the measure. It simply ruled that the fact that the Commission does not exclude a funding method in the opening decision does not suffice for that funding to be implicitly included in that decision.

26. Thirdly, the *Land* of Bavaria and the interest grouping consider this ground of appeal to be inadmissible, as it consists in a repetition of grounds and arguments presented before the General Court.

27. However, as I will explain in the following points, those arguments cannot succeed and the first ground of appeal is admissible.

28. Contrary to the submissions of the *Land* of Bavaria and the interest grouping, the first ground of appeal does not ask the Court to carry out a new assessment of the facts.

29. Suffice it to state that, in the context of the present ground of appeal, the Court is called upon to interpret Article 6(1) of Regulation No 659/1999 in the light of Article 108(2) TFEU so as to determine the degree of precision required in a decision to initiate a formal investigation, in the light of the Commission's obligation to 'summarise the relevant issues of fact and law'. In any event, if, in that context, the Court of Justice must examine the interpretation of the contested decision by the General Court, then it follows from the judgment of 11 March 2020, *Commission* v *Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo* (C-56/18 P, EU:C:2020:192; 'the judgment in *Gdynia*'; paragraph 121) that such an issue constitutes a question of law, which is admissible at the appeal stage.

30. Moreover, this ground of appeal cannot be considered as inadmissible on the basis that it allegedly reiterates arguments already presented before the General Court.

31. It follows from the case-law that 'where the appellant challenges the interpretation or application of EU law by the General Court, the points of law examined at first instance may be discussed again in the course of an appeal. Indeed, if an appellant could not thus base his appeal

on pleas in law and arguments already relied on before the General Court, an appeal would be deprived of part of its purpose'.[9]

2. Substance

(a) Brief summary of the arguments of the parties

32. The Commission submits that, in paragraphs 60 to 67 of the first judgment under appeal and paragraphs 56 to 64 of the second judgment under appeal, the General Court erred in law in the interpretation and application of Article 108(2) TFEU and Article 6(1) of Regulation No 659/1999 as well as the case-law of the EU judicature relating to those provisions, when defining the requirements for the content of an opening decision. The Commission contends that the source of the financing of aid must be identified in the opening decision only exceptionally and in specific circumstances.

33. The Commission points out that in such an opening decision it sets out the relevant factual and legal elements concerning the measure potentially constituting State aid and submits those elements to a preliminary evaluation.[10] In the present case, the General Court rightly ruled that the payment made to a testing body for the purposes of milk-quality tests constituted a single measure of aid. That measure was financed from the budget of the *Land* of Bavaria whose resources were transferred to the milk-testing body, Milchprüfring Bayern eV, by a decision on the single annual use of those funds. That measure was described in recitals 3, 5 and 15 to 20 of the opening decision.

34. In the opening decision, the Commission presented the budget item for that measure in the 'expenditure' part of the budget of the *Land* of Bavaria. However, the General Court reproached it for failing to indicate the 'revenue' part of that budget item, that is to say, the sources of financing of the aid. The Commission considers that the General Court thereby established a new procedural requirement, which has no basis in law.

35. According to the Commission, it follows, in particular, from the judgment of 21 October 2003, *van Calster and Others* (C-261/01 and C-262/01, EU:C:2003:571), that it is only in exceptional situations, when there is an indissoluble link between the revenue and the expenditure and there are indicia implying that the mode of collecting the revenue infringes another provision of EU law that the amendment of the aid scheme, by the Member State, must also concern the mode of financing of that measure. It follows from that case-law that, in the opening decision, the Commission is not required to specify the source of financing of the aid measure, save for exceptional cases.

36. In the present case, the funding is mixed and it was only the part of the funding derived from the milk levy which was problematic. Therefore, the Commission submits that it was not obliged to indicate expressly the other mode of funding, that is to say, from the general budget of the *Land* of Bavaria.

[9] Judgment of 21 September 2010, *Sweden and Others* v *API and Commission* (C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 116).

[10] Judgment of 21 July 2011, *Alcoa Trasformazioni* v *Commission* (C-194/09 P, EU:C:2011:497).

37. The Commission adds that, under Article 107(1) TFEU, the existence of aid is established by the fact that the measure is funded by way of State resources. Therefore, the precise origin of those State resources is irrelevant as regards the question of the existence of aid.

38. The Commission also draws a distinction between the aid measure (the transfer of a given amount to the aid recipients), on the one hand, and the funding of that measure (its different sources: the milk levy and the tax revenue from the *Land* of Bavaria), on the other. Moreover, the Commission points out that the defendants did not contest the facts as established by the Commission and that the General Court did not find any error in that regard. Hence, the Commission submits that it defined the aid measure in the same manner in the contested decision as in the opening decision. It follows clearly from the general budget described in those decisions that that single aid measure had encompassed two sources of funding. The Commission refers to the judgment of 13 June 2019, *Copebi* (C-505/18, EU:C:2019:500; 'the judgment in *Copebi*'), which, it argues, confirmed its view that it is not obligatory that the sources of funding of the aid measure are indicated in the smallest details in the opening decision. A description of that aid measure is sufficient.

39. The *Land* of Bavaria and the interest grouping submit, in essence, that the first ground of appeal is unfounded. First, they contend that the Commission is basing its argument on an inexact citation of the content of the judgments under appeal. Secondly, they submit that the Commission's opening decision must at all times define sufficiently the Commission's framework of examination and so must indicate clearly all of the various funding methods considered by the Commission. Thirdly, the *Land* of Bavaria and the interest grouping contest the Commission's assertion that the General Court ruled that 'the payment for milk-quality tests' constituted a 'sole and single aid measure'. Finally, to the extent that the Commission is referring explicitly, in the opening decision, to a specific funding method, they contend that the Commission is bound by that reference and cannot integrate a posteriori other funding sources into its assessment.

(b) Assessment

40. As a preliminary remark, it is not clear to me why the Commission failed to mention the budgetary funding method for the aid measure in the opening decision (given that it did refer to funding, but only to one of the two methods, that is, funding through the milk levy); the most likely explanation is that of an inadvertent omission.

41. As the General Court rightly ruled in paragraph 60 of the first judgment under appeal, the Commission may not simply argue that it is sufficient that the opening decision *did not exclude the funding using resources from the general budget of the* Land *of Bavaria*. Indeed, Article 6(1) of Regulation No 659/1999 establishes a positive obligation on the Commission to summarise the relevant issues of fact and law, in accordance with which it is unable to rely on such an argument, which would render that obligation meaningless.

42. It follows from Article 108(2) TFEU that the Commission has a duty to put the interested parties on formal notice for them to be in a position to put forward their comments during the formal investigation phase.

43. As the General Court has already ruled in its case-law, the formal investigation procedure permits a more in-depth examination and clarification of the questions raised in the opening decision. [11]

44. The purpose of the opening decision is to define the framework of the Commission's investigation. [12]

45. Therefore, I would stress that the opening decision must allow the interested parties to present their views in the formal examination procedure in a useful and effective manner.

46. The first sentence of Article 6(1) of Regulation No 659/1999 makes clear that 'the decision to initiate the formal investigation procedure shall summarise the relevant issues of fact and law, shall include a preliminary assessment of the Commission as to the aid character of the proposed measure and shall set out the doubts as to its compatibility with the common market'.

47. To my mind, the funding method of an aid measure undeniably constitutes a 'relevant issue of fact' in order to determine whether there is a State aid measure within the meaning of Article 107(1) TFEU.

48. Indeed, as follows from the case-law, [13] 'categorisation as State aid within the meaning of Article 107(1) TFEU presupposes that four conditions are met, namely, [(i)] that there is an intervention by the State or through State resources, [(ii)] that the intervention is liable to affect trade between Member States, [(iii)] that it confers a selective advantage on the beneficiary and [(iv)] that it distorts or threatens to distort competition'.

49. In relation to the first condition, which is at issue here, that same case-law states that 'for it to be possible to classify advantages as State aid, first, they must be granted directly or indirectly through State resources and, secondly, that grant must be attributable to the State'. [14]

50. Therefore, the distinction the Commission is seeking to establish between the funding of a measure and the payment of the aid to the beneficiary is tenuous.

51. Moreover, as the *Land* of Bavaria and the interest grouping pointed out, the funding method for the measure is also likely to play a role in the present case in the context of the characterisation of a selective advantage within the meaning of Article 107(1) TFEU as well as in the assessment of the concept of existing aid.

52. In the judgment of 21 October 2003, *van Calster and Others* (C-261/01 and C-262/01, EU:C:2003:571, paragraph 49), the Court ruled that 'the method by which an aid is financed may render the entire aid scheme incompatible with the common market. Therefore, the aid cannot be considered separately from the effects of its method of financing … Quite to the contrary, consideration of an aid measure by the Commission must necessarily also take into account the method of financing the aid in a case where that method forms an integral part of the measure'.

[11] Judgment of 4 March 2009, *Italy* v *Commission* (T-424/05, not published, EU:T:2009:49, paragraph 69), cited in paragraph 47 of the first judgment under appeal.

[12] See judgment of 15 December 2009, *EDF* v *Commission* (T-156/04, EU:T:2009:505, paragraph 108).

[13] Judgment of 19 December 2013, *Association Vent De Colère! And Others* (C-262/12, EU:C:2013:851, paragraph 15 and the case-law cited).

[14] Ibid., paragraph 16 and the case-law cited.

53. It is true that 'review by the EU judicature of the legality of a decision to initiate the formal investigation procedure, where the applicant challenges the Commission's assessment of a measure as constituting State aid, is limited to ascertaining whether or not the Commission has made a manifest error of assessment'. [15]

54. However, the determination of relevant issues of fact and law, which, as required by Article 6(1) of Regulation No 659/1999, must be set out in the Commission's opening decision, must be based on objective criteria.

55. Yet, that would not be the case if the Court accepted that relevant issues of fact and law could remain unmentioned in that decision simply because the Commission, the author of that act, considered that those issues were self-evident.

56. Accordingly, while – as is argued by the Commission – it may appear that the funding through the general budget of a Member State constitutes State resources, the fact remains that that does not justify the Commission's omission of that element in the opening decision, because this fact is a constitutive element of the State aid measure.

57. Such an element manifestly constitutes a 'relevant issue of fact and law' within the meaning of Article 6(1) of Regulation No 659/1999.

58. Indeed, such a solution also follows from the principle of determinability (or 'principle of precision', in German *Bestimmtheitsgrundsatz*, which is one expression of the principle of legal certainty) of binding acts of public authorities, which requires that the content of an act must present a certain level of clarity and precision. Article 2 TEU, which declares that the European Union is founded, inter alia, on the rule of law, may indeed be considered as the formal Treaty basis of this principle. As the Court has ruled on various occasions, the principle of legal certainty is a fundamental principle of EU law that requires that rules should be clear and precise, so that individuals may be able to ascertain unequivocally what their rights and obligations are and may take steps accordingly. [16]

59. Hence, contrary to what the Commission suggests in paragraph 52 of its appeal in Case C-167/19 P, that institution may not limit itself to setting out relevant circumstances or 'issues of fact or law' which are, in its opinion, not 'evident'.

60. Article 6(1) of Regulation No 659/1999 takes as a base the relevance of issues of fact and law for the formal investigation: what matters is not the presumed and subjective 'evidence' of such issues, but rather their relevance for the decision. In the present case, the issues in question concern the funding via State resources, which constitute one of the conditions under Article 107(1) TFEU. Therefore, this funding must be considered as relevant for the final decision.

61. Furthermore, I consider that the Commission cannot invoke the provisional character of the opening decision in order to justify the omission of such a relevant issue. I agree with the interest grouping that it is necessary for the interested party to be able to present its observations on issues of fact and law which are necessary for the assessment of the aid measure at issue.

[15] Judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971, paragraph 78 and the case-law cited).

[16] See judgments of 14 April 2005, *Belgium* v *Commission* (C-110/03, EU:C:2005:223, paragraph 30); of 9 July 1981, *Gondrand and Garancini* (169/80, EU:C:1981:171, paragraph 17); and of 13 February 1996, *Van Es Douane Agenten* (C-143/93, EU:C:1996:45, paragraph 27).

62. Contrary to the Commission's arguments, to my mind it follows from the judgment of 21 July 2011, *Alcoa Trasformazioni* v *Commission* (C-194/09 P, EU:C:2011:497, paragraph 103), that the Commission must provide 'adequate reasons [in the opening decision] by explaining clearly the grounds which led it to conclude provisionally that the measure at issue constituted aid and stating that it had serious doubts as to whether it was compatible with the common market'.

63. Next, I consider that the Commission is also wrong when it alleges that its position is supported by the judgments of 30 May 2013, *Doux Élevage and Coopérative agricole UKL-ARREE* (C-677/11, EU:C:2013:348), and of 21 October 2003, *van Calster and Others* (C-261/01 and C-262/01, EU:C:2003:571).

64. Those judgments are not directly pertinent to the present context. First, as pointed out by the *Land* of Bavaria and the interest grouping, the former concerns a substantive issue: the scope of the concept of State resources.

65. Secondly, the judgment of 21 October 2003, *van Calster and Others* (C-261/01 and C-262/01, EU:C:2003:571) does not justify a conclusion according to which the source of funding of the aid should only be specified in the opening decision in exceptional cases and in particular circumstances. That judgment does not relate to the content of the opening decision, but the scope of the Member States' obligation to notify. In the first place, the parallel drawn by the Commission is not appropriate as the notification of an aid measure and the opening decision concern different stages of the procedure, have distinct functions and obey different legal criteria. In the second place, in any event, that judgment merely states that, in certain cases, the funding method of aid must be mentioned in the notification of the measure. In any event, the issue in the present case is not merely the lack of information concerning a funding method in the opening decision, but the fact that that decision fails to mention one of the two funding methods of the aid measure entirely.

66. I consider that the Commission's arguments, based on its own interpretation of the judgment in *Copebi*, are unhelpful to its cause.

67. Indeed, contrary to what the Commission alleges, the legal questions at issue in the present case are clearly not resolved in the above judgment. The situation underlying that judgment is different to the present one already as far as facts are concerned. In the judgment in *Copebi*, what was at issue was not the content of the opening decision, but the final decision: in particular, the circle of addressees of the final decision.

68. As pointed out by the interest grouping, in the judgment in *Copebi*, the introduction of the aid procedure was communicated by the Commission in compliance with all the required formalities, so that there was no infringement of the rights to participate in the procedure.[17] In the judgment in *Copebi*, the various findings show that both the funding source, Oniflhor (the National Fruit, Vegetables and Horticulture Trade Board, France), and the measure concerned were identified and Copebi SCA was included, as a fruit and vegetable producer, in the circle of parties potentially concerned by a recovery of the aid. The CEBI agricultural committee,[18] not cited, was merely distributing the resources guaranteed by the governmental authority, hence acting, ultimately, as a simple paying agency. It constituted neither a funding source nor a 'relevant issue' for the purposes of the qualification as State aid.

[17] Judgment of 13 June 2019, *Copebi* (C-505/18, EU:C:2019:500, paragraphs 34 and 35).

[18] Comité économique bigarreau industrie (Economic Committee for the Whiteheart Cherry Industry) ('CEBI').

69. I would point out that my approach to the first ground of appeal is supported by numerous judgments, bearing in mind that, thus far, only the General Court has had an opportunity to address this issue.

70. It follows from the judgment in *Diputación Foral de Álava and Others* v *Commission* [19] that, in the opening decision, the Commission should indicate clearly which elements of the measure concerned it is contesting.

71. The General Court has already ruled that the opening decision must be sufficiently precise to allow interested parties to assess whether they want to submit observations. [20]

72. It has also held that 'the Commission must … define sufficiently the framework of its investigation so as not to render meaningless the right of interested parties to submit their comments'. [21]

73. Similarly, it has ruled that 'the Commission must … define sufficiently the framework of its investigation in order to enable the Member State against which the procedure is opened to put forward its comments *on all the matters of law or fact constituting the grounds of the final decision by which the Commission rules on the compatibility of the measure in question with the common market*'. [22]

74. In the judgment of 22 February 2006, *Le Levant 001 and Others* v *Commission* (T-34/02, EU:T:2006:59, paragraphs 77 to 83), the General Court ruled that the Commission had violated Article 108(2) TFEU and Article 6(1) of Regulation No 659/1999 as it had not called on the private investors to submit their comments. It ruled that the identification of the beneficiary of the aid is necessarily one of the 'relevant issues of fact and law' within the meaning of the first sentence of Article 6(1). Hence, it must, under that provision, be contained in the opening decision if that is possible at that stage of the procedure, since it is on the basis of that identification that the Commission will be able to adopt the recovery decision. In the absence of an indication that a party is a beneficiary of the aid in dispute, either in the decision to open the procedure or at a later stage in the formal investigation procedure prior to adoption of the final decision finding that the aid is incompatible with the common market, that type of interested party cannot be regarded as having been duly called on to submit its comments, because it may legitimately believe that such comments are not necessary, since it is not named as the beneficiary of the aid to be recovered.

75. Thus, for example, in *Greece* v *Commission*, [23] concerning aid to Olympic Airways that had been transferred to a successor company through the sub-lease of an aircraft that was allegedly less than the rents under the head lease, the Commission's decision was annulled on the ground that the decision to open the formal investigation contained no preliminary assessment of the rents paid with a view to determining whether they contained any element of aid. [24]

[19] Judgment of 6 March 2002 (T-127/99, T-129/99 and T-148/99, EU:T:2002:59, paragraph 136) (appeal dismissed by the Court of Justice).

[20] Judgment of 11 May 2005, *Saxonia Edelmetalle* v *Commission* (T-111/01 and T-133/01, EU:T:2005:166, paragraph 50) (not appealed). See Hancher, L., Ottervanger, T., and Slot, P.J., *EU State Aids*, Sweet&Maxwell, 4th edition, 2012, p. 968.

[21] Judgment of 1 July 2009, *ISD Polska and Others* v *Commission* (T-273/06 and T-297/06, EU:T:2009:233, paragraph 126).

[22] Emphasis added. Judgment of 30 November 2009, *France* v *Commission* (T-427/04 and T-17/05, EU:T:2009:474, paragraph 137).

[23] Judgment of 13 September 2010 (T-415/05, T-416/05 and T-423/05, EU:T:2010:386, paragraph 240) (the judgment was not appealed to the Court of Justice).

[24] See Quigley, C., *European State Aid Law and Policy*, Bloomsbury, 3rd edition, 2015, p. 556.

76. In the judgment of 1 July 2009, *KG Holding and Others* v *Commission* (T-81/07 to T-83/07, EU:T:2009:237, paragraph 134), the decision was partially annulled to the extent that the subject matter of the recovery order was not alluded to in the opening decision.

77. My approach is also supported by the General Court's judgment in *Ferriere Nord* v *Commission* [25]: 'The principle of protection of legitimate expectations on which the applicant relies means that in carrying out the procedure involving review of State aid, the Commission must take account of the legitimate expectations which the parties concerned may entertain as a result of what was said in the [opening] decision … and, subsequently, that it does not base its final decision on the absence of elements which, in the light of those indications, the parties concerned were unable to consider that they must provide to it.'

78. It follows from the foregoing considerations that the first ground of appeal must be rejected as unfounded.

B. Second ground of appeal, alleging a failure to state reasons resulting from an incorrect interpretation of the opening decision

1. Admissibility

79. The *Land* of Bavaria and the interest grouping argue that both limbs of the second ground of appeal are inadmissible, as the Commission is contesting the General Court's assessment of facts and is repeating arguments and grounds presented at first instance.

80. I consider that those arguments should be rejected for reasons analogous to those set out in points 28 to 31 of the present Opinion.

2. Substance

(a) Brief summary of the arguments of the parties

81. In a subsidiary ground of appeal, which formally has two limbs, the Commission attacks paragraphs 53 to 58 and 62 of the first judgment under appeal and paragraphs 47 to 53 and 56 of the second judgment under appeal.

(1) First limb of the second ground of appeal

82. The Commission submits that the General Court erred in law when it interpreted the opening decision in a selective manner, basing itself on a limited number of recitals, whereas it is required to take account of all the recitals of that decision. [26]

83. The Commission recalls, first, that the opening decision (recital 5) mentions 'amounts of budgetary origin' and 'amounts destined for the assistance'. Even if that latter expression refers to the funding by way of resources coming from a distinct budget, derived, in particular, from the

[25] Judgment of 18 November 2004 (T-176/01, EU:T:2004:336, paragraph 88) (appeal dismissed by the Court of Justice).

[26] Order of 10 July 2001, *Irish Sugar* v *Commission* (C-497/99 P, EU:C:2001:393).

proceeds of the milk levy, the Commission considers that it is obvious that that expression also refers to the funding from the general budget. In its view, it also follows from recital 18 of the opening decision that the funding is secured through budgetary resources and the resources from the milk levy.

84. Secondly, the Commission alleges four errors of law committed by the General Court in its interpretation of the opening decision.

85. The first alleged error of law concerns paragraph 53 of the first judgment under appeal and paragraph 48 of the second judgment under appeal. The Commission contends that the General Court failed to examine the first argument raised by the Commission and therefore infringed its obligation to state reasons and to analyse all the grounds of defence presented before it.

86. The second alleged error of law concerns paragraphs 54 and 57 of the first judgment under appeal and paragraphs 49, 52 and 53 of the second judgment under appeal. The Commission contends that the mention, by way of example, in recital 17 of the opening decision of the provisions of the *Land* of Baden-Württemberg allows the *Land* of Bavaria to deduce that the identical Bavarian provisions – to which it had referred in the preliminary examination phase and in its response to the formal examination procedure – were also covered by the opening decision.

87. The third alleged error of law relates to paragraph 55 of the first judgment under appeal and to paragraph 50 of the second judgment under appeal, where the General Court interpreted Section 3.3.1 of the opening decision as limiting the preliminary examination phase to a single funding method (the milk levy). The Commission recalls that this section of the opening decision contained only a provisional assessment of the character of the aid at issue. Therefore, this analysis cannot result in a limitation of the description of relevant factual and legal issues set out in Section 2 of that decision.

88. In the context of the fourth alleged error of law, the Commission raises the same grounds, concerning paragraph 56 of the first judgment under appeal and paragraph 51 of the second judgment under appeal, where the General Court allegedly declared that recital 264 of the opening decision only mentions the funding through the milk levy.

89. The *Land* of Bavaria and the interest grouping submit, in essence, that the Commission is wrong to argue that the General Court, in its assessment of facts set out in the opening decision, based itself in a selective manner on certain recitals of that decision. They also contest the argument according to which it can be deduced from the reference to the financial regulation of the *Land* of Baden-Württemberg that the regulation of the *Land* of Bavaria is also covered by the opening decision.

(2) Second limb of the second ground of appeal

90. The Commission contests the statement of the General Court in paragraph 62 of the first judgment under appeal and paragraph 56 of the second judgment under appeal, according to which the content of the administrative file is irrelevant for the purposes of the interpretation of the opening decision. On the contrary, the Commission contends that, on reading the letters exchanged in the course of the preliminary examination, neither the *Land* of Bavaria nor the General Court could have doubts that the formal investigation procedure also covered the funding from general tax revenue.

91. Moreover, the Commission argues that, in paragraphs 53 to 58 and 62 of the first judgment under appeal and paragraphs 47 to 53 of the second judgment under appeal, the General Court infringed the case-law on the obligation to state reasons and failed to respond to the Commission's arguments.

92. The *Land* of Bavaria and the interest grouping submit, in essence, that this limb of the second ground of appeal is unfounded. Contrary to what the Commission suggests, the General Court did not declare that the content of the file of the administrative procedure is irrelevant for the interpretation of the opening decision. The interest grouping adds that the citation, by way of example, of the legislation of *Länder* is not sufficient adequately to inform interested parties. The interest grouping also contends that the assessment carried out by the Commission in the opening decision relates only to the measures adopted under the MFG.

(b) Assessment

93. I consider that the two limbs of this ground of appeal must be dealt with together.

94. As the General Court found in paragraph 57 of the first judgment under appeal, it was confirmed by the Commission itself during the proceedings at first instance that the funding of milk-quality tests using the *Land* of Bavaria's budgetary resources was not mentioned in the opening decision.

95. In my view, it is not necessary to address the numerous arguments raised by the Commission, in so far as it necessarily follows from my assessment of the first ground of appeal that an issue of fact or law which is relevant for the examination procedure, within the meaning of Article 6(1) of Regulation No 659/1999, may not simply be considered to be *implicitly 'recapitulated' in* or *deduced from* a Commission opening decision.

96. As follows from point 41 of the present Opinion: (i) Article 6(1) of Regulation No 659/1999 establishes a positive obligation on the Commission and so this already rules out any such implicit recapitulation or deduction, and (ii) if the Court were to accept such implicit recapitulation or deduction, it would render meaningless the right of interested parties to submit their comments in State aid procedures.

97. To my mind, issues of fact or law that are relevant for the examination procedure must be set out explicitly in the opening decision.

98. Indeed, it is settled case-law that 'the statement of reasons required by [Article 296 TFEU] must be appropriate to the measure at issue and must *disclose in a clear and unequivocal fashion* the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations'. [27]

[27] Emphasis added. See judgment of 21 July 2011, *Alcoa Trasformazioni* v *Commission* (C-194/09 P, EU:C:2011:497, paragraph 96 and the case-law cited).

99. One final remark is in order: if one were to accept the Commission's line of argument in the present case, how could the Court, in the context of an action for annulment, rule on a potential failure to state the grounds in a decision if it were permitted that that decision might mention certain relevant issues of fact or law only *implicitly*?

100. It follows that both of the limbs of the second ground of appeal must be rejected as either unfounded or ineffective. As a result, the second ground of appeal must be rejected as well.

C. Third ground of appeal, alleging an error of law in the interpretation of Article 263(2) TFEU

1. Admissibility

101. The *Land* of Bavaria and the interest grouping contest the admissibility of this ground of appeal, since it could not, by itself, lead to the annulment of the judgments under appeal, as it is closely linked to the fourth ground of appeal.

102. However, even if the third and fourth grounds of appeal are closely linked (the third ground may only be upheld if the fourth ground is upheld), that in and of itself does not suffice to declare either of them inadmissible. To my mind, the third ground of appeal cannot be considered ineffective because it is clear from reading the Commission's appeals that it did not present the fourth ground of appeal as merely subsidiary to the third ground – indeed, both grounds of appeal are placed at the same level.

103. The *Land* of Bavaria and the interest grouping also argue that the third ground of appeal is inadmissible because the Commission is contesting the General Court's assessment of facts and is repeating arguments and grounds presented before the General Court.

104. I consider that those arguments should be rejected for reasons analogous to those set out in points 28 to 31 of the present Opinion.

2. Substance

(a) Brief summary of the arguments of the parties

105. The Commission submits in essence that, in paragraphs 70 and 71 of the first judgment under appeal and paragraphs 66 to 68 of the second judgment under appeal, the General Court erred in law when it held that the rights of participation of third parties are essential procedural requirements within the meaning of the second paragraph of Article 263 TFEU.

106. The *Land* of Bavaria and the interest grouping contend, in essence, that this ground of appeal is unfounded. They argue that the breach of an essential procedural requirement automatically brings about an annulment of the contested decision. They also submit that the judgment of 8 May 2008, *Ferriere Nord* v *Commission* (C-49/05 P, not published, EU:C:2008:259; 'the judgment in *Ferriere Nord*') is irrelevant to the present case. As for the judgment of 11 December 2008, *Commission* v *Freistaat Sachsen* (C-334/07 P, EU:C:2008:709; 'the judgment

in *Freistaat Sachsen*'), those parties argue that that judgment states that the Commission's obligation under Article 108(2) TFEU to allow the parties concerned to submit their comments, during the formal investigation procedure, constitutes an essential procedural requirement.

(b) Assessment

107. Certain recent case-law of the General Court in the area of State aid control [28] applies a very formalistic vision and seeks to prescribe overly strict requirements for the Commission and its decisions. Such case-law goes beyond the requirements established in the Court of Justice's jurisprudence. Aside from the present cases (as far as the third and fourth grounds of appeal are concerned), one such example is the case I discuss in detail in the present Opinion (the judgment in *Gdynia*), where the Court of Justice rejected the General Court's approach and set aside its judgment.

108. Furthermore, I would also point out that in my Opinion of 3 June 2021, in Case C-57/19 P, *Tempus Energy* (currently pending), I explain that in that case the General Court's approach must be rejected and its judgment set aside because the General Court made errors of law by finding that the notified aid measure gave rise to serious doubts regarding its compatibility with the internal market. In my view, the General Court erred in that regard by taking into account, as a primary indicator of doubts, the length and circumstances of the pre-notification contacts and the complexity and novelty of the measure and further erred in faulting the Commission for failing to investigate appropriately certain aspects of the UK capacity market. [29]

109. As I will explain below, the main problem with the judgments under appeal is that if the Court of Justice accepted the General Court's approach, this would blur the long-established distinction in the Court of Justice's case-law between the rights of the addressee Member State in State aid procedures, on the one hand, and the (more limited) rights of the interested parties, on the other.

(1) The rights of defence of the Member State concerned vs the right of interested parties to be involved

110. Indeed, it is clear in the case-law of the Court that the rights of interested parties have a more limited scope than the rights of defence of the Member State concerned [30] and their infringement may not lead to the annulment of the final decision unless the Member State establishes that, in the absence of that infringement, the result of the procedure could have been different. [31]

[28] See for a general overview of recent State aid case-law, for instance, Staviczky, P., *What Will the EU Court's Recent Judgments Annulling Commission's State Aid Decisions Bring to Member States*?, European State Aid Law Quarterly, Number 3, 2019, p. 293. See also, for instance, in the same number of that journal: Buendia, J.L., Buts, C., and Cyndecka, M., *Review of EU Case Law on State Aid – 2018*, p. 313.

[29] There are further examples where the General Court's approach and judgments annulling the Commission's decision were disapproved by the Court of Justice on appeal. See, for instance, judgments of 22 December 2008, *British Aggregates* v *Commission* (C-487/06 P, EU:C:2008:757); of 8 September 2011, *Commission* v *Netherland*s (C-279/08 P, EU:C:2011:551); of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732); and of 2 December 2009, *Commission* v *Ireland and Others* (C-89/08 P, EU:C:2009:742).

[30] Judgment of 2 April 1998, *Commission* v *Sytraval and Brink's France* (C-367/95 P, EU:C:1998:154).

[31] Judgment of 14 February 1990, *France* v *Commission* (C-301/87, EU:C:1990:67).

111. In that regard, it follows from the case-law that although all interested parties are invited to submit observations in the course of the formal investigation procedure, this procedure does not lead to an *inter partes* debate with the complainant, or even with the recipient of the aid. The comments received in the course of the formal investigation will be submitted only to the Member State concerned. [32]

112. Furthermore, only the Member State concerned can successfully raise a plea relating to a violation of its rights of defence in an annulment procedure before the Union courts. [33]

113. In that connection, I would point out that – even as regards the Member State concerned – the Court is reluctant to refer to a right to be heard during the initial stage of the investigation. [34]

114. Indeed, the Union courts' case-law has confirmed that, in the area of State aid control, the third parties do not enjoy any of the following rights: the right to be informed that the Commission is investigating aid in the preliminary phase, [35] the right to be informed of the essential facts before an opening decision is adopted, [36] the right to submit comments in the preliminary phase, [37] or the right of access to the Commission's file. [38] Further, third parties do not have a right to appeal to the hearing officer on procedural issues, a full right to be heard (aside from submitting comments on the opening decision), or a right to participate in the meetings between the Commission and the Member State concerned.

115. As the Court recalled in paragraphs 80 to 82 of the judgment of 24 September 2002, *Falck and Acciaierie di Bolzano* v *Commission* (C-74/00 P and C-75/00 P, EU:C:2002:524; 'the judgment in *Falck*'), 'in proceedings concerning the application of Article [108(2) TFEU], [the] publication of a notice in the *Official Journal of the European* [*Union*] is an appropriate means of informing all the parties concerned that a procedure has been initiated … That communication is intended to obtain from persons concerned all information required for the guidance of the Commission with regard to its future action … Such a procedure also guarantees to the other Member States and the sectors concerned an opportunity to make their views known … However, the procedure for reviewing State aid … is, in view of its general scheme, a procedure initiated in respect of the Member State responsible, in light of its [Union] obligations, for granting the aid. Thus, in order to observe the rights of the defence, where the Member State concerned was not afforded an opportunity to comment on certain information, the Commission may not use it in its decision with regard to that State … In the procedure for reviewing State aid, interested parties other than the Member State concerned have only the role mentioned in paragraph 80 of this judgment and, in that regard, they cannot themselves seek to engage in an adversarial debate with the Commission in the same way as is offered to the abovementioned Member State'.

116. Therefore, it is necessary to consider the present ground of appeal in the light of that case-law of the Court of Justice.

[32] See judgment of 2 April 1998, *Commission* v *Sytraval and Brink's France* (C-367/95 P, EU:C:1998:154, paragraph 59). See also judgment of 8 July 2004, *Technische Glaswerke Ilmenau* v *Commission* (T-198/01, EU:T:2004:222, paragraphs 193 to 198).

[33] Judgments of 10 July 1986, *Belgium* v *Commission* (234/84, EU:C:1986:302, paragraph 30), and of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 165).

[34] Judgment of 10 May 2005, *Italy* v *Commission* (C-400/99, EU:C:2005:275, paragraphs 29 to 35).

[35] Judgment of 11 March 2009, *TF1* v *Commission* (T-354/05, EU:T:2009:66).

[36] Judgment of 11 March 2009, *TF1* v *Commission* (T-354/05, EU:T:2009:66).

[37] Judgment of 11 March 2009, *TF1* v *Commission* (T-354/05, EU:T:2009:66).

[38] Judgment of 29 June 2010, *Commission* v *Technische Glaswerke Ilmenau* (C-139/07 P, EU:C:2010:376).

117. As we shall see below, the conclusion of the General Court, in paragraphs 70 and 71 of the first judgment under appeal and paragraphs 66 to 68 of the second judgment under appeal, that the rights of participation of third parties are essential procedural requirements within the meaning of the second paragraph of Article 263 TFEU disregards the case-law of the Court of Justice cited above and constitutes an error of law.

118. Moreover, such an approach must also be rejected as it leads to a position in law which is in fundamental contradiction with the rights of defence of the Member State concerned vis-à-vis the Commission and which would paradoxically better protect the rights of interested parties than those of that Member State.

119. In the judgment in *Ferriere Nord*, the Court transposed the case-law on the rights of the defence to the right to be involved in the administrative procedure. Therefore, a breach of that right cannot lead to the annulment of a Commission's final decision unless – in the absence of that breach – the procedure could have led to a different result.

120. In paragraph 70 of the first judgment under appeal and paragraph 67 of the second judgment under appeal, the General Court based its reasoning on paragraph 55 of the judgment in *Freistaat Sachsen*.[39] However, it did so by omitting paragraph 56 of that judgment, which expressly confirms the judgment in *Ferriere Nord*.[40]

121. I agree with the Commission that the apparent contradiction between the judgments in *Ferriere Nord* and *Freistaat Sachsen* is rendered nugatory if we understand them to mean that it is only the *obligation to open the formal examination procedure* that constitutes an essential procedural requirement. In other words, the Commission may not adopt a decision closing the formal investigation procedure under Article 7 of Regulation No 659/1999 where it has not previously opened the formal investigation procedure by way of decision under Article 4(4) and Article 6(1) of that regulation.

122. It is the absence of adoption of an opening decision which constitutes the infringement of an essential procedural requirement.

123. Indeed, a parallel may be drawn here with the fact that, as a general rule, essential procedural requirements express a fundamental institutional rule.[41] This is consistent with the abovementioned requirement from the Court's case-law that the Commission must open the formal investigation procedure and adopt an opening decision, which justifiably constitutes an essential procedural requirement.

124. By contrast, the eventual absence of a relevant issue of fact or law in the opening procedure – such as the absence in the opening decision of an explicit reference to one of the sources of funding of the aid measure – does not reflect a fundamental institutional rule and constitutes,

[39] '… it follows from Article 88(2) EC and Article 1(h) of Regulation No 659/1999 that, where the Commission decides to initiate the formal investigation procedure in respect of proposed aid, it must give interested parties, including the undertaking(s) concerned, an opportunity to submit their comments. This rule is in the nature of an essential procedural requirement.'

[40] 'It follows that, where the legal rules under which a Member State notified proposed aid change before the Commission takes its decision, the Commission must, with a view to giving its decision, as it is obliged to do, on the basis of the new rules, ask the interested parties to express their views on the compatibility of that aid with those rules. The situation is different only if the new legal rules do not contain any substantial amendments in relation to those previously in force (see, to that effect, [the] judgment [in] *Ferriere Nord* …, paragraphs 68 to 71).'

[41] Lenaerts, K., Maselis, I., and Gutman, K., *EU Procedural Law*, OUP, 2014, p. 371.

instead, a 'lesser' breach: that is, a breach of the rights of third parties to be involved in the administrative procedure since that absence prevents them from presenting their observations on that element.

125. That breach cannot lead to the automatic annulment of the final decision. That decision can only be annulled if the interested parties can establish that the information they would have communicated regarding that element was liable to modify the content of the decision closing the formal investigation procedure.

126. In this connection, it may be pointed out that the judgment of 8 September 2016, *Goldfish and Others* v *Commission* (T-54/14, EU:T:2016:455), cited in paragraph 70 of the first judgment under appeal and paragraph 67 of the second judgment under appeal, does not corroborate the interpretation of the General Court. Indeed, that judgment supports instead my interpretation of the judgment in *Freistaat Sachsen*. In paragraph 47 of the judgment in *Goldfish and Others* v *Commission*, the General Court characterised as inadmissible 'evidence obtained in *complete* disregard of the procedure laid down for gathering it and designed to protect the fundamental rights of interested persons' (emphasis added).

127. The difference between an essential procedural requirement and a subjective right (such as *in casu* the rights of interested parties to participate in the administrative procedure in the area of State aid control) was aptly summed up by Advocate General Fennelly in *Commission* v *ICI*[42]: 'While the Court has tended to avoid abstract definitions of the term essential procedural requirement, it seems to me from the case-law that this notion is reserved for procedural requirements which are intrinsically linked to the formation and expression of the intention of the adopting authority, and that, as is clear from Article [263 TFEU], any breach of such a requirement necessarily justifies the annulment of the measure as a whole. As the breach concerns the measure in its entirety, it is neither necessary, nor in most cases possible, for the party relying on it to show a particular adverse effect on its subjective rights or interests; the breach constitutes a failure to respect so fundamental a rule affecting the adoption or form of the measure that it cannot be considered to be the valid and authentic act of the institution.'

128. In order to underline why a breach of the rights of the interested parties to participate in the State aid procedure is not an essential procedural requirement, it is useful to cite examples of what the Union Courts qualify as an essential procedural requirement: the consultation of Member States provided for before the introduction of a definitive anti-dumping duty or decision on a matter of competition law.[43] The complete absence of such consultation automatically results in the annulment of the anti-dumping regulation. A substantive error or a delay in the consultation only gives rise to an annulment if the result of the consultation could have been impacted by it.

129. As a result, we can draw a parallel with the opening decision: a complete absence thereof automatically leads to the annulment of the final decision, whereas a substantive lacuna in the opening decision does not bring about that result, unless it can be shown to affect the outcome of the State aid investigation.

[42] Opinion in *Commission* v *ICI* (C-286/95 P and C-287/95 P, EU:C:1999:578, point 22).

[43] This has already been considered by the General Court; see judgments of 22 May 2014, *Guangdong Kito Ceramics and Others* v *Council* (T-633/11, not published, EU:T:2014:271, paragraph 86 and the case-law cited) (including case-law in the area of competition law); of 13 September 2010, *Whirlpool Europe* v *Council* (T-314/06, EU:T:2010:390, paragraphs 91 to 96 and the case-law cited) (including that in the area of competition law); of 11 September 2014, *Gold East Paper and Gold Huasheng Paper* v *Council* (T-443/11, EU:T:2014:774, paragraphs 95 to 101); of 17 February 2011, *Zhejiang Xinshiji Foods and Hubei Xinshiji Foods* v *Council* (T-122/09, not published, EU:T:2011:46, paragraphs 100 to 112); and of 30 April 2015, *VTZ and Others* v *Council* (T-432/12, not published, EU:T:2015:248, paragraphs 176 to 185 and 212 to 217).

(2) The judgment in Gdynia *has already rejected the General Court's attempts to transform a breach of the rights of interested parties into an essential procedural requirement*

130. In the judgment in *Gdynia*, in particular, paragraphs 78 to 82 thereof,[44] the Court of Justice emphatically rejected the General Court's approach and confirmed that the rights of third parties to be involved in the administrative procedure under Article 108(2) TFEU do not constitute essential procedural requirements within the meaning of Article 263 TFEU.

131. In that appeal, the Commission argued, in essence, that the General Court had misapplied the right conferred on interested parties by Article 108(2) TFEU to submit comments – in a manner contrary to the judgment in *Ferriere Nord* – wherein the General Court wrongly classified that right, in the circumstances of that case, as an essential procedural requirement, failure to comply with which automatically resulted in the annulment of the decision at issue.

132. It should be pointed out that Gdynia and PLGK and the Republic of Poland submitted, in essence, that the Commission was minimising the importance of the right of the interested parties to submit comments. They claimed that the Commission's argument relying on case-law according to which the role of interested parties in a formal investigation procedure is only to serve as a source of information for the Commission is contrary to EU law as it currently stands, since the judgments cited by the Commission in that regard were delivered before the entry into force of the Charter of Fundamental Rights of the European Union ('the Charter'). Those parties argued that the interested parties' right to be given the opportunity to submit comments in a situation such as that at issue in that case must now be assessed in the light of the fundamental rights protected by the Charter and, in particular, in the light of the right to good administration provided for in Article 41 of the Charter, which is one of the components thereof. Hence, the interested parties' right to be heard before the adoption of a Commission decision should now be taken into account.

133. The line of argument put forward by Gdynia and PLGK and the Republic of Poland suggests that the right of third parties to be involved in the administrative procedure under Article 108(2) TFEU constitutes an essential procedural requirement and it is, essentially, what the General Court sought to achieve in its judgment of 17 November 2017, *Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo* v *Commission* (T-263/15, EU:T:2017:820), and what it seeks to achieve in the judgments under appeal.

134. However, I believe that in the present case this discussion is moot because the judgment in *Gdynia* has clearly rejected such an approach.

135. First, in paragraph 70 of the judgment in *Gdynia*, the Court recalled that according to the case-law 'undertakings which may be beneficiaries of State aid are regarded as being interested parties and … the Commission has the duty, at the examination phase referred to in Article 108(2) TFEU, to invite those parties to submit their comments'.

136. Then, in paragraph 71 of that judgment, the Court stressed that 'although those interested parties cannot rely on the rights of defence, they have, by contrast, the right to be involved in the administrative procedure followed by the Commission, to an extent appropriate to the circumstances of the case'.

[44] See also my Opinion in *Commission* v *Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo* (C-56/18 P, EU:C:2019:569).

137. My approach in the present Opinion is further confirmed by the fact that the Court based itself in the paragraphs that I cite below (that is, paragraphs 72 to 75 of the judgment in *Gdynia*) on the judgment in *Falck* (paragraphs 80 to 83),[45] in order clearly to underline the difference between the rights (of defence) of the Member State concerned to *(directly) participate* in the administrative procedure and the rights of third parties to *be (indirectly) involved* in the administrative procedure.

138. In paragraph 72 of the judgment in *Gdynia*, the Court recalls essentially that interested parties (only) enjoy such rights in order to enable the Commission to be informed in an appropriate manner.

139. In paragraph 73, the Court stresses that the procedure for reviewing State aid is, in view of its general scheme, a procedure initiated in respect of the Member State concerned.

140. Whereas, as the Court points out – relying again on the judgment in *Falck*[46] – in paragraph 74 of the judgment in *Gdynia*, that 'interested parties other than the Member State concerned have only the role mentioned in paragraph 72 [of that judgment] and, in that regard, they *cannot themselves seek to engage in an adversarial debate with the Commission in the same way as is offered to the abovementioned Member State*' (emphasis added).

141. In paragraph 75 of the judgment in *Gdynia*, the Court adds that 'no special role is reserved to the recipient of aid, among all the interested parties, by any provision of the procedure for reviewing State aid', not least because that procedure is not a procedure initiated against the recipient of aid entailing rights on which it could rely which are as extensive as the rights of the defence as such.

142. In the case which gave rise to the judgment in *Gdynia*, the interested parties were not invited to submit observations on the applicability and potential impact of Commission guidelines of 2014[47] before the contested decision was adopted, even though those guidelines were published after the adoption of the opening decision and, accordingly, after the closure of the initial investigation procedure. Hence the question arose whether the General Court could rule in that case that the rights of interested parties to submit observations on the new legal framework (in particular, the 2014 Guidelines), before the contested decision was adopted, constituted an essential procedural requirement, within the meaning of Article 263 TFEU – the breach of which causes that decision to be annulled, without it being necessary to establish that the administrative procedure could have led to a different result.

143. The Court replied in the negative.

144. The Court ruled that the invitation of interested parties to submit comments on circumstances which had not been mentioned in the opening decision, such as the adoption of new assessment rules after the publication of the opening decision according to Article 108(2) TFEU constituted not an essential procedural requirement but a *procedural irregularity*, which therefore did not lead automatically to the annulment of the final decision (paragraphs 78 to 82 of that judgment).

[45] I cite the relevant paragraphs of the judgment in *Falck* in point 115 of the present Opinion.

[46] I cite the relevant paragraphs of the judgment in *Falck* in point 115 of the present Opinion.

[47] Commission Communication entitled 'Guidelines on State aid to airports and airlines' (OJ 2014 C 99, p. 3; 'the 2014 Guidelines').

145. In particular, in paragraph 78, the Court of Justice explained that it must be examined whether the General Court was entitled to find that the interested parties' right in that case to submit comments on the new legal regime before the contested decision was adopted *constituted an essential procedural requirement* within the meaning of Article 263 TFEU.

146. In the following paragraph (paragraph 79 of the judgment in *Gdynia*), the Court referred to the judgment in *Ferriere Nord* and stated that 'the Commission cannot, without infringing the procedural rights of the interested parties, base its decision on new principles introduced by a new legal regime, without inviting those interested parties to submit their comments in that regard'.

147. However, such 'a *procedural irregularity* will entail the annulment of a decision in whole or in part only if it is shown that in the absence of such irregularity the decision being challenged might have been substantively different'.[48] The Court cites there the judgment of 23 April 1986, *Bernardi* v *Parliament* (150/84, EU:C:1986:167).

148. More specifically, in paragraph 81, the Court pointed out that 'as regards the interested parties' procedural rights, where there is a change in the legal regime after the Commission has given the interested parties the opportunity to submit their comments and before the Commission has adopted a decision on proposed aid, and where the Commission bases that decision on the new legal regime without inviting those parties to submit their comments on it, the mere existence of differences between the legal regime on which those parties were given the opportunity to submit their comments and that on which that decision is based is not, as such, capable of leading to the annulment of that decision. Even though the legal regimes at issue have changed, the question arises as to whether, in the light of the provisions of those regimes which are relevant to the case, that change was capable of altering the meaning of the decision in question'.

149. As a result, in paragraph 82 of the judgment in *Gdynia*, the Court of Justice ruled that the General Court 'erred in law, in paragraph 81 of the judgment under appeal, when it held that the interested parties' right to submit comments in circumstances such as those at issue in the present case is an essential procedural requirement within the meaning of Article 263 TFEU the infringement of which leads to the annulment of the decision at issue, without it being necessary to establish that the infringement of that right could have affected the meaning of that decision'.

150. In paragraph 86 of that judgment, the Court of Justice held that 'the General Court could not, without disregarding the case-law relating to the procedural rights of interested parties as set out in paragraphs 70 to 75 and 79 to 81 [of the judgment in *Gdynia*], find that there is no need to examine the effect on the decision at issue of the failure to invite the interested parties to express their views on the 2014 Guidelines before that decision was adopted, or find that there was such an effect without examining the Commission's arguments that there was an autonomous and independent legal basis for that decision'.

151. It may also be pointed out that in paragraphs 87 and 88 of the judgment in *Gdynia*, the Court refers only to the judgment in *Freistaat Sachsen* (paragraph 55) as a reaction to the defendants' arguments and restates its earlier declaration that the interested parties' right to submit comments in circumstances such as those at issue in that case do not constitute an essential procedural requirement.

[48] Emphasis added; paragraph 80 of the judgment in *Gdynia*.

152. The Court does not base its reasoning in this respect on the content of the opening decision, but on the Commission's obligation 'where [it] decides to initiate the formal investigation procedure in respect of proposed aid, [to] give interested parties, including the undertaking … concerned, the opportunity to submit their comments' (paragraph 87 of the judgment in *Gdynia*).

153. As the Court pointed out in paragraph 88, first, the judgment in *Freistaat Sachsen*, 'concerns the Commission's obligations at the time of the opening of the formal investigation procedure. Secondly, it raises the question of the application of new legal rules adopted after the notification of proposed aid. That judgment therefore deals with issues separate to those raised in the present appeal, since the right to be given an opportunity to submit comments, on which the municipality of Gdynia and PLGK rely, relates to a change in the legal regime which took place after those parties were invited to submit their comments and before the decision at issue was adopted'.

154. It follows that the essential procedural requirement of Article 108(2) TFEU vis-à-vis interested parties resides exclusively in the invitation addressed to interested parties in order to allow them to present their comments promptly after the adoption of the opening decision.

(3) Argument for the sake of completeness concerning the judgment in Freistaat Sachsen

155. As is customary for the Opinion of an Advocate General, I shall consider – for the sake of completeness – whether my conclusion should be different if one were to consider for the sake of the argument (*quod non*) that the General Court (in paragraph 70 of the first judgment under appeal and paragraph 67 of the second judgment under appeal) was correct in relying on the judgment in *Freistaat Sachsen* (paragraph 55) to the effect that 'the obligation on the Commission to place the interested parties in a position, at the stage of the [opening] decision, to put forward their comments is in the nature of an essential procedural requirement …, the infringement of which has consequences, such as the annulment of the defective act, irrespective of whether that infringement caused harm to the person pleading it or whether the administrative procedure might have led to a different result'.

156. My conclusion holds even in this scenario: in fact, the logical consequence of that finding of the General Court is that the judgment in *Gdynia* would then overrule (or even correct) the judgment in *Freistaat Sachsen*.

157. Indeed, instead of examining whether, in that case, such an essential procedural requirement was breached (in the judgment in *Gdynia*, paragraph 78), as we saw in my analysis above, the Court of Justice based itself on the judgment in *Bernardi* v *Parliament* (150/84, EU:C:1986:167, paragraph 28) so as to assess 'whether the General Court was entitled to find … that the interested parties' right in the present case to submit comments on that new legal regime and, in particular, on the 2014 Guidelines, before the decision at issue was adopted, constitutes an essential procedural requirement within the meaning of Article 263 TFEU, the infringement of which leads to the annulment of that decision, without it being necessary to establish that the administrative procedure could have led to a different result'.

158. It follows that, in paragraphs 70 and 71 of the first judgment under appeal and paragraphs 66 to 68 of the second judgment under appeal, the General Court made an error of law in ruling that 'the obligation on the Commission to place the interested parties in a position, at the stage of the [opening] decision, to put forward their comments is in the nature of an essential procedural requirement'.

159. This is because the failure to comply with the rights of interested parties to participate in the administrative procedure – such as failing to afford them the opportunity to submit comments – does not constitute an infringement of an essential procedural requirement, which would automatically result in the contested decision being set aside.

160. I agree with the Commission that, even if the present case does not concern comments from interested parties *on legal rules* (such as the Commission guidelines for State aid investigations, as was the case in the judgment in *Gdynia*), but concerns rather their comments *on a factual element* (that is, the second funding method of the aid regime at issue in the present case: the budgetary resources of the *Land* of Bavaria), that difference concerning the *subject* of the absent comments does not preclude the application of the judgment in *Gdynia*.

161. *In both cases the problem is the same* – that interested parties were unable to make known their opinion on the respective elements contained in the opening decision.

162. The difference between the *causes* of the absence of observations of interested parties in those two cases – that is, the absence of a reference in the opening decision or the adoption of new Commission guidelines after the opening decision was published – is irrelevant. What matters is that in both cases the interested parties' rights to participate in the administrative procedure were breached.

163. Indeed, the General Court itself underlined in paragraph 71 of the first judgment under appeal that the rights of participation in the administrative procedure were breached.

164. Therefore, it follows from all the foregoing considerations that the third ground of appeal must be upheld.

D. Fourth ground of appeal, alleging error of law in the interpretation of the right of interested parties to submit their comments

1. Admissibility

165. The *Land* of Bavaria and the interest grouping contend that the fourth ground of appeal is inadmissible. They submit that in paragraphs 72 and 75 of the first judgment under appeal the General Court concluded that there was an impact of the breach of the interested parties' right to submit observations on the outcome of the procedure; this was done on the basis of a statement which is purely factual. The interest grouping submits that this ground is inadmissible as it concerns the assessment of facts by the General Court and that it amounts to a repetition of grounds and arguments already presented before the General Court.

166. First, the *Land* of Bavaria cannot reproach the Commission for allegedly relying on new facts, given that the Commission is relying on the content of the contested decision, which is a legal act. Secondly, suffice it to point out that those arguments may be rejected for the same reasons as those in points 28 to 31 of the present Opinion.

2. Substance

(a) Brief summary of the arguments of the parties

167. The Commission complains that the General Court wrongly found, in paragraphs 72 to 75 of the first judgment under appeal and paragraphs 70 to 72 of the second judgment under appeal, that observations of the interested parties on the question as to whether budgetary funding constitutes State resources could have had an effect on the outcome of the proceedings. The Commission submits that the General Court not only infringed Article 108(2) and (3) TFEU and Article 6(1) of Regulation No 659/1999, but also misinterpreted the concept of State resources under Article 107(1) TFEU and the concept of existing aid under Article 108(1) TFEU. Finally, the Commission complains that the General Court also distorted the facts established in the contested decision and failed to examine the Commission's grounds of defence.

168. First, the Commission contests the finding, in paragraph 73 of the first judgment under appeal and paragraph 71 of the second judgment under appeal, that the *Land* of Bavaria could not provide its views on the question as to whether the milk-quality tests funded through general tax revenue were tests going beyond the requisite legal obligation. The Commission submits that the arguments of that *Land* presented in the course of the formal investigation did not modify the result of that procedure, as the funding of the supplementary tests fell outside the scope of application of the contested decision. Next, the Commission contends that the General Court failed to examine its grounds of defence: first, that even if the arguments of the *Land* of Bavaria in relation to the supplementary tests were correct, it was, in any event, common ground that those tests were carried out pursuant to the MFG. However, the opening decision covered all tests foreseen by that regulation and so covered those tests also.

169. Secondly, the Commission contests the finding in paragraph 74 of the first judgment under appeal that the *Land* of Bavaria could not be heard on the question as to whether the measure at issue constituted existing aid. The General Court failed to respond to the Commission's grounds of defence.

170. In that regard, the Commission indicates that the opening decision, in recitals 140 to 152, allowed the interested parties to take a position on the presence of existing aid. It adds that, as follows from recitals 41 to 56 of the contested decision, the *Land* of Bavaria presented its detailed observations on that point.

171. The *Land* of Bavaria and the interest grouping contend, in essence, that this ground of appeal is unfounded in so far as it is based on a misinterpretation of the judgments under appeal. They argue that the question as to whether budgetary resources constitute State resources is irrelevant. Next, those parties submit that the question as to whether – without the breach of the interested parties' rights of participation – the procedure could have had a different outcome is also irrelevant. The interest grouping contends moreover that the Commission cannot allege that the supplementary tests were covered by a separate Commission decision.

(b) Assessment

172. Given that the third ground of appeal should be upheld, it is necessary to address the fourth ground of appeal also.

173. Therefore, it must be examined whether – in the absence of the breach of the interested parties' right to be involved in the procedure (that is, if the interested parties had been able to submit comments on the second funding method of the aid measure) – the procedure could have led to a different outcome, as is suggested by the General Court in the judgments under appeal.

(1) The approach in the judgments under appeal

174. First of all, the *Land* of Bavaria and the interest grouping are wrong to argue that in the present context it is sufficient to *assume* that any comments they could have submitted would have had the necessary impact.

175. Indeed, the judgment in *Ferriere Nord* (paragraph 83) makes clear that the Court must verify whether the position is 'capable of altering the meaning of the decision in question'.

176. Yet, the General Court's reasoning in paragraphs 73 to 75 of the first judgment under appeal is based exclusively on hypotheses and deductions.

177. As we will see below, the General Court failed to even assess – let alone show – that the observations of the interested parties on the second source of funding of the aid measure at issue (that is, the budget of the *Land* of Bavaria) *could have modified the examination procedure*.

178. I agree with the Commission that the General Court should have proceeded as follows: the interested party must present to it the facts that it would have submitted in the administrative procedure, but was prevented from doing so due to the breach of its rights of participation – the General Court must presume that those facts are true. On that basis, the General Court must examine whether those facts, if the Commission had verified their exactitude in the course of the administrative procedure, would have been capable of modifying the legal assessment of the case.

179. However, in the present case, the General Court completely omitted the second stage of that analysis. That stage does not concern the finding of facts, but the assessment of legal effects of those facts, 'even if true'. [49]

180. Therefore, the General Court committed an error of law.

181. When applying its approach to the facts of the present case, the General Court concluded that, in the absence of the procedural failure found (if the applicant at first instance had actually had an opportunity during the formal investigation procedure to submit its comments on the funding from the general budget), it cannot be ruled out that the procedure might have led to a different result.

182. It based this conclusion on two arguments. First, the *Land* of Bavaria could not submit its comments on the question whether the tests financed through the funding from its budgetary resources go beyond what was compulsory by law (paragraph 73 of the first judgment under appeal). Secondly, the General Court found that the *Land* of Bavaria could not be heard on the question as to whether the case raised the issue of an existing aid (paragraph 74 thereof).

[49] See judgments of 16 June 2016, *SKW Stahl-Metallurgie and SKW Stahl-Metallurgie Holding* v *Commission* (C-154/14 P, EU:C:2016:445, paragraphs 69 to 76), and of 11 January 2007, *Technische Glaswerke Ilmenau* v *Commission* (C-404/04 P, not published, EU:C:2007:6, paragraphs 131 to 136).

183. In relation to the first argument (paragraph 73 of the first judgment under appeal), the allegation made by the *Land* of Bavaria, according to which other measures were financed through general tax revenues and not the tests financed through the milk levy (that is, the milk-quality tests 'which went beyond what was compulsory', whose 'purpose' was 'other') is unfounded, not least because the Commission stated as follows in recitals 25 and 27 of the contested decision: 'Germany claims that these measures do not constitute aid for the following reasons: … Particularly important are additional tests on raw milk, which go well beyond what is required by the MGV [50] … The Commission notes that financial support paid in respect of these additional tests are covered by a separate Decision'.

184. This finding was not contested before the General Court. I consider that it follows that the General Court made an error of law in paragraph 73 of the first judgment under appeal. This applies *mutatis mutandis* to paragraphs 70 to 72 of the second judgment under appeal.

185. The General Court also made an error of law when it misinterpreted the Court's case-law on the consequences of a breach of the rights of participation in the procedure. The simple fact of *submitting an argument* before the General Court is insufficient. What is necessary is that the General Court then proceeds to *an assessment of that argument on substance* in order to verify whether it was *capable of modifying* the outcome of the administrative procedure. [51]

186. An argument of the *Land* of Bavaria presented in the formal investigation procedure in relation to whether the milk-quality tests went beyond what is required by law could not have modified the outcome of the procedure, not least because the Commission precisely excluded such supplementary tests from the field of application of the contested decision.

187. Furthermore, the General Court failed to examine the two arguments raised by the Commission before it, where the Commission sought to show that the argument concerning the supplementary tests was in any event intrinsically unfounded.

188. In essence, the Commission argued before the General Court, first, that even if the argument of the *Land* of Bavaria concerning those tests were correct (*quod non*), it was in any event common ground between the parties that this is a question of taking samples under the MGV – that is, taking of samples which is regulated by law. As a result, all the tests are carried out under the MFG. Given that the opening decision concerned all tests foreseen by the MGV, it covered the taking of the above samples as well. [52]

189. Secondly, the Commission argued that it was not 'a fortiori' that the costs of tests 'going [allegedly] beyond what was compulsory' were not normally to be borne by the milk buyers, as was alleged by the *Land* of Bavaria before the General Court. Indeed, on the contrary, these are precisely the costs that the undertakings incur when they voluntarily take measures, without any legal obligation and in their own interest, and which they should, normally, bear themselves. [53]

50 Milch-Güteverordnung (Milk Quality Regulation) of 9 July 1980 (BGBl. 1980 I, p. 878; 'the MGV').

51 For an illustration of that principle, see judgment of 1 October 2009, *Foshan Shunde Yongjian Housewares & Hardware* v *Council* (C-141/08 P, EU:C:2009:598, paragraphs 83 to 104; 'the judgment in *Foshan Shunde*').

52 See further, in this connection, paragraphs 22 to 24 and 35 of the defence at first instance and its Annex A.35, p. 372, as well as paragraphs 19 to 21 of the rejoinder.

53 See paragraph 21 of the rejoinder at first instance.

190. Therefore, the fact that the General Court failed to examine those arguments is in itself an error of law. [54]

191. In relation to the second argument (paragraph 74 of the first judgment under appeal), it too cannot succeed for the reasons the Commission put forward before the General Court, which failed to mention – let alone address – those reasons in the judgments under appeal.

192. Those arguments were the following: first, the opening decision allowed already the parties to comment on the presence of an 'existing aid' in relation to the funding through general tax revenue (recitals 140 to 152 of that decision).

193. Secondly, in any event, it results already from the nature of the aid scheme that it is granted anew each year or every two years. [55] However, Article 1(b) of Regulation No 659/1999 militates against its qualification as existing aid in the present case.

194. Thirdly, irrespective of the truthfulness of the argument of the *Land* of Bavaria that the cost reduction for the dairies by way of a provision of general tax revenue 'had always been practised', which the Commission contests, the fact remains that it would not be capable of establishing the presence of an existing aid under Article 1(b). Indeed, it is not the funding method of a measure which is determinative in this respect, but the measure itself. Yet, the measure consists in the grant each year of a subsidy from the annual or biannual budget.

195. Fourthly, the *Land* of Bavaria (as opposed to the *Land* of Baden-Württemberg, for instance) has never argued during the administrative procedure that there was a question of existing aid.

196. Given that these arguments were presented before the General Court and the latter failed to mention let alone address them, paragraph 74 of the first judgment under appeal constitutes an error of law. [56]

(2) Comparison of the approach of the judgments under appeal with the Court's judgment in Gdynia

197. The correct approach, which the General Court should have followed, is described in the Court's judgment in *Gdynia*.

198. In that judgment, after finding that there had been a procedural irregularity, the Court verified whether the breach of procedural rights of the interested parties could have impacted the outcome of the examination procedure.

199. On the basis of a *detailed assessment* (paragraphs 83 to 86 and 123 to 160 of the judgment in *Gdynia*), the Court concluded on the basis of the statement of reasons in the contested decision, that it would have had the same content if the interested parties had been able to submit comments on the 2014 Guidelines.

[54] See judgment of 24 October 2013, *Land Burgenland and Others* v *Commission* (C-214/12 P, C-215/12 P and C-223/12 P, EU:C:2013:682, paragraphs 110 to 112).

[55] See further, in that connection, paragraphs 6 and 36 to 39 of the defence at first instance and paragraphs 33, 34 and 50 to 97 of the rejoinder.

[56] See judgment of 24 October 2013, *Land Burgenland and Others* v *Commission* (C-214/12 P, C-215/12 P and C-223/12 P, EU:C:2013:682, paragraphs 110 to 112).

200. I consider (as does the Commission) that after it found a breach of the interested parties' rights to submit comments, the General Court could not base the hypothesis of a different outcome of the examination procedure, in the absence of such a breach, on *simple presumptions or suppositions*.

201. It could only do so on the basis of a detailed assessment (such as the one carried out by the Court in *Gdynia*) of the statement of reasons in the contested decision and an analysis of the arguments of the opposing parties. The General Court should have examined all the Commission's arguments and it is only once those turned out to be ineffective that it could have explained why, in its view, a different outcome for the examination procedure was possible, basing itself on elements contained in the contested decision.

202. In view of the foregoing considerations, the reasoning of the General Court in paragraphs 72 to 75 of the first judgment under appeal and paragraphs 70 to 72 of the second judgment under appeal, according to which the breach of the interested parties' right to submit comments should cause the contested decision to be annulled, is vitiated by an error of law.

203. Indeed, the General Court simply declared that *it is possible* that, in the absence of the irregularity established in that judgment, the procedure might have led to a different outcome (paragraph 72 of the first judgment under appeal).

204. However, the possibility of a different outcome to the procedure is insufficient to justify the annulment of a Union act.

205. It follows clearly from the judgment in *Gdynia* that what is necessary is a *positive finding* of a different outcome.

206. In that regard, I refer to paragraph 81 of the judgment in *Gdynia*: 'whether, in the light of the provisions of those regimes which are relevant to the case, that change was capable of altering the meaning of the decision in question'; paragraph 95 thereof: 'the errors found in paragraphs 82 to 86 [of that judgment] can lead to the judgment under appeal being set aside, in so far as the General Court annulled the decision at issue, only if the provisions of the 2014 Guidelines on which the Commission relied in that decision were not actually capable of changing the meaning of that decision'; and paragraph 132: 'in that regard, it must be noted that, as is apparent from paragraph 81 [of that judgment], in a situation such as that at issue in the present case, the EU judicature cannot simply identify amendments introduced by a new legal regime, in order to justify annulling a Commission decision applying that regime, but must also ascertain whether the change in legal regime was capable of influencing that decision'.

207. I would add that, here too, the difference between the absence of observations on new compatibility criteria (the new 2014 Guidelines, as in the judgment in *Gdynia*), on the one hand, and the part of funding which indisputably constitutes an element of State resources (as in the present case), on the other hand, is irrelevant for the application of the criterion of legal assessment mentioned above.

(3) In any event, the case-law prior to the judgment in Gdynia *was also clear on the correct approach*

208. In *Council* v *Interpipe Niko Tube and Interpipe NTRP*,[57] a party to the procedure learnt, one day before the adoption of a regulation, of elements used to carry out certain calculations. On the basis of that information, that party secured a partial annulment by the General Court of the regulation at issue. The party in question argued that an annulment to a greater extent would have been possible on the basis of supplementary information, which it would have submitted had it been informed earlier of those elements. The Court of Justice upheld that argument, given that the legal relevance of the information was confirmed by the partial annulment of the regulation.

209. In *SKW Stahl-Metallurgie and SKW Stahl-Metallurgie Holding* v *Commission*,[58] the appellants could not take a position, due to a breach of their rights of defence, on the question of the influence of the undertaking Degussa on another undertaking (SKW). The Court ruled that the imputation of responsibility for the cartel was based on several elements and that, as a result, the question of that influence, even if that argument were true, was without impact on the decision.

210. In *Germany* v *Commission*,[59] the Commission failed to send certain letters from the competitors of the aid recipient to the Member State concerned (Germany), which claimed that its rights of defence had been breached and so the decision should be annulled. The Court examined whether the German Government – had it received those observations – would have been able to submit arguments which would have led the Commission to authorise the aid measure. However, the German Government was not able to point to any element of fact or law which would have led the Commission to take a different decision. The Court's answer was negative: the prohibition of the State aid resulted from applicable guidelines and so Jadekost benefited from operating aid which could neither have been authorised under those guidelines nor as a matter of principle.

211. In the judgment in *Technische Glaswerke Ilmenau* v *Commission*,[60] the Court proceeded in the same manner. It examined whether the arguments that could not have been submitted, due to the breach of the rights of defence, even if true, would have been capable of leading to the authorisation of the aid measure. The Court ruled that that was not the case, as the absence of a restructuring plan would, in any event, have led to the prohibition.

212. In *Westdeutsche Landesbank*,[61] the German Government argued that its right to be heard had been infringed because the Commission had refused to grant access to certain documents. Having examined the content of the documents, the General Court concluded that no breach of the rights of defence took place inter alia because the documents were, in essence, a development or clarification of views already expressed.

[57] Judgment of 16 February 2012 (C-191/09 P and C-200/09 P, EU:C:2012:78, paragraphs 75 to 88).

[58] Judgment of 16 June 2016 (C-154/14 P, EU:C:2016:445, paragraphs 69 to 76).

[59] Judgment of 5 October 2000 (C-288/96, EU:C:2000:537, paragraphs 92 to 106; 'the judgment in *Jadekost*').

[60] Judgment of 11 January 2007 (C-404/04 P, not published, EU:C:2007:6, paragraphs 131 to 136).

[61] Judgment of 6 March 2003, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission* (T-228/99 and T-233/99, EU:T:2003:57).

213. Finally, the *Land* of Bavaria and the interest grouping rely, in particular, on the judgment in *Foshan Shunde* (paragraph 94), to support their line of argument. However, that judgment is not helpful to their cause. As the Commission pointed out, in paragraph 81 of that judgment, the Court recalls established case-law concerning the possibility of a different outcome of the procedure.

214. The fact that the test has not been changed in that case-law is also confirmed, for instance, by a more recent judgment of 10 September 2013, *G. and R.* (C-383/13 PPU, EU:C:2013:533, paragraph 40), where the Court refers to the judgment in *Foshan Shunde*. There the Court clearly explains the test: 'to make such a finding of unlawfulness, [it is necessary to] assess whether, in the light of the factual and legal circumstances of the case, the outcome of the administrative procedure at issue could have been different if the [parties] in question had been able to put forward information which might show that [the result of the procedure should be different]'.

215. Paragraph 94 of the judgment in *Foshan Shunde* merely takes into account a particularity of that case, that is, that the anti-dumping rules (such as those in the area of competition law) foresee veritable rights of defence on the part of undertakings and, in particular, a dialogue with the Commission, whereas under the State aid rules the interested parties' rights of participation in the procedure clearly do not comprise such a dialogue. [62]

(4) Conclusion with regard to the fourth ground of appeal

216. In the same way as operating aid in the judgment in *Jadekost* and restructuring aid without a restructuring plan in the judgment of 11 January 2007, *Technische Glaswerke Ilmenau* v *Commission* (C-404/04 P, not published, EU:C:2007:6) are prohibited in any event, general budgetary resources are, as a general rule, likely to constitute State resources under Article 107(1) TFEU.

217. Therefore, I agree with the Commission that the General Court's approach in the judgments under appeal must be rejected, as it would set a dangerous precedent – one which contradicts the case-law of the Court of Justice and negates the effectiveness of the filter provided by the criterion of a potentially different result of the administrative procedure.

218. It follows that the fourth ground of appeal must be upheld.

219. Since the third and fourth grounds of appeal should be upheld, the judgments under appeal must be set aside.

IV. Referral of the case back to the General Court

220. In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the Court of Justice may, where the decision of the General Court has been set aside, either itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

[62] See the judgment in *Falck* (paragraph 82), and judgment of 15 November 2011, *Commission and Spain* v *Gibraltar and the United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 181).

221. The first plea in law at first instance can be ruled upon by the Court of Justice, as it was the subject of extensive exchanges of arguments between the parties before the General Court as well as now before the Court of Justice. I consider that the Court should reject that plea for the reasons of the annulment of the judgments under appeal.

222. In relation to the other pleas in law, however, the case must be referred back to the General Court, as they need to be discussed and examined at first instance.

V. Costs

223. Since the case is to be referred back to the General Court, the costs relating to the present appeal proceedings must be reserved.

VI. Conclusion

224. In the light of the foregoing I propose that the Court of Justice should:

1. Dismiss the first two grounds of appeal;

2. Set aside the judgments of the General Court of the European Union of 12 December 2018, *Freistaat Bayern* v *European Commission* (T-683/15, EU:T:2018:916), and *Interessengemeinschaft privater Milchverarbeiter Bayerns e.V. and Others* v *European Commission* (T-722/15 to T-724/15, not published, EU:T:2018:920);

3. Reject the first plea in law in the actions for annulment in so far as that complaint alleges infringement of the procedural rights of the interested parties in the present cases based on the fact that they were not given the opportunity to express their views on the funding of the aid from the general budget;

4. Refer the case back to the General Court for a consideration of the outstanding pleas at first instance;

5. Reserve the costs.