Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

26 September 2024*

(Appeal – State aid – Aid scheme implemented by the Federal Republic of Germany in favour of large electricity consumers – Exemption from network charges in 2012 and 2013 – Decision declaring the aid scheme incompatible with the internal market – Action for annulment – Time limit for bringing proceedings – Admissibility – Article 107(1) TFEU – Concept of 'State aid' – State resources – Parafiscal charge or other compulsory surcharges)

In Joined Cases C-794/21 P and C-800/21 P,

TWO APPEALS under Article 56 of the Statute of the Court of Justice of the European Union, lodged, respectively, on 16 and 17 December 2021,

Federal Republic of Germany, represented by J. Möller and R. Kanitz, acting as Agents,

appellant in Case C-794/21 P,

the other parties to the proceedings being:

Infineon Technologies Dresden GmbH & Co. KG, established in Dresden (Germany),

Infineon Technologies AG, established in Neubiberg (Germany),

represented by L. Assmann and M. Peiffer, Rechtsanwälte,

applicants at first instance,

European Commission, represented by K. Herrmann, C. Kovács and T. Maxian Rusche, acting as Agents,

defendant at first instance,

and

Infineon Technologies AG, established in Neubiberg,

Infineon Technologies Dresden GmbH & Co. KG, established in Dresden,

represented by L. Assmann and M. Peiffer, Rechtsanwälte,

* Language of the case: German.

appellants in Case C-800/21 P,

the other parties to the proceedings being:

European Commission, represented by K. Herrmann, C. Kovács and T. Maxian Rusche, acting as Agents, and by H. Heinrich, Rechtsanwalt,

defendant at first instance,

Federal Republic of Germany, represented by J. Möller and R. Kanitz, acting as Agents,

intervener at first instance,

THE COURT (Third Chamber),

composed of K. Jürimäe (Rapporteur), President of the Chamber, K. Lenaerts, President of the Court, acting as Judge of the Third Chamber, N. Piçarra, N. Jääskinen and M. Gavalec, Judges,

Advocate General: L. Medina,

Registrar: D. Dittert, Head of Unit,

having regard to the written procedure and further to the hearing on 28 June 2023,

after hearing the Opinion of the Advocate General at the sitting on 9 November 2023,

gives the following

Judgment

1 By its appeal in Case C-794/21 P, the Federal Republic of Germany asks the Court of Justice to set aside the judgment of the General Court of the European Union of 6 October 2021, *Infineon Technologies Dresden and Infineon Technologies* v *Commission* (T-233/19 and T-234/19, EU:T:2021:647; 'the judgment under appeal'), by which the General Court dismissed the actions of Infineon Technologies Dresden GmbH & Co. KG and of Infineon Technologies AG (together, 'the Infineon companies') seeking annulment of Commission Decision (EU) 2019/56 of 28 May 2018 on aid scheme SA.34045 (2013/c) (ex 2012/NN) implemented by Germany for baseload consumers under Paragraph 19 StromNEV (OJ 2019 L 14, p. 1; 'the decision at issue').

2 By their appeal in Case C-800/21 P, the Infineon companies ask the Court to set aside the judgment under appeal.

3 By its cross-appeals, brought in Cases C-794/21 P and C-800/21 P, the European Commission also asks the Court to set aside the judgment under appeal.

Legal context

4 Recital 39 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 [TFEU] (OJ 2015 L 248, p. 9) states:

'In the interests of transparency and legal certainty, it is appropriate to give public information on Commission decisions while, at the same time, maintaining the principle that decisions in State aid cases are addressed to the Member State concerned. It is therefore appropriate to publish all decisions which might affect the interests of interested parties either in full or in a summary form or to make copies of such decisions available to interested parties, where they have not been published or where they have not been published in full.'

5 Article 1(h) of that regulation provides:

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

…

(h) "interested party" means any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations.'

6 Article 32 of that regulation, entitled 'Publication of decisions', provides, in paragraph 3 thereof:

'The Commission shall publish in the *Official Journal of the European Union* the decisions which it takes pursuant to Article 8(1) and (2) and Article 9.'

Background to the dispute and the decision at issue

7 The background to the dispute, as set out in paragraphs 1 to 22 of the judgment under appeal, may be summarised as follows.

The legislative and regulatory measures at issue

The system of network charges prior to the introduction of the measures at issue

8 Paragraph 21 of the Energiewirtschaftsgesetz (Law on the protection of the energy supply), as amended by the Gesetz zur Neuregelung energiewirtschaftsrechtlicher Vorschriften (Law reforming the provisions on the energy supply) of 26 July 2011 (BGBl. 2011 I, p. 1554), and prior to the amendments made by the Gesetz zur Weiterentwicklung des Strommarktes (Law on the development of the electricity market) of 26 July 2016 (BGBl. 2016 I, p. 1786; 'the 2011 EnWG'), provided, inter alia, that network charges must be reasonable, non-discriminatory, transparent and calculated on the basis of the costs of an efficient operation of the network.

9 Paragraph 24 of the 2011 EnWG empowered the German Federal Government to lay down, by means of regulations, detailed provisions concerning, first, the definition of the general methodology for calculating network charges and, second, the regulation of atypical network use and the conditions under which the regulatory authority may authorise or prohibit individual network charges.

10 Paragraph 17 of the Stromnetzentgeltverordnung (Federal Regulation on network charges) of 25 July 2005 (BGBl. 2005 I, p. 2225; 'the 2005 StromNEV Regulation'), defines the calculation methodology to be used by network operators in order to determine the general charges. This involves a two-step methodology that consists, first of all, in determining the various annual cost components of all networks and, next, in calculating the general charges on the basis of the total annual network costs.

11 The determination of the general charges takes into account the following two factors, namely the 'simultaneity function', which expresses the probability that the individual consumption of a user contributes to the annual peak load of the network level concerned, and the maximum revenue level per operator, as set by the Bundesnetzagentur (Federal Network Agency, Germany; 'the BNetzA') on the basis of benchmarking with other network operators, aimed at preventing costs resulting from inefficiencies from being recovered through network charges.

12 Paragraph 19 of the 2005 StromNEV Regulation provides for individual charges for categories of users whose consumption and load profiles are very different from those of other users ('atypical users'). Those charges take into account, in accordance with the principle that network charges reflect the costs of the network, the contribution of those atypical users to reducing or preventing an increase in those costs.

13 In that regard, Paragraph 19(2) of the 2005 StromNEV Regulation establishes individual charges for the following two categories of atypical users:

– users whose peak load contribution may differ significantly from the simultaneous annual peak load of all other users connected to the same network level, that is to say, users who systematically consume electricity outside peak times ('non-peak consumers'); and

– users whose annual electricity consumption represents at least 7 000 hours of use and more than 10 gigawatt hours ('baseload consumers').

14 Until its amendment by the 2011 EnWG, the 2005 StromNEV Regulation provided that non-peak consumers and baseload consumers were to be subject to individual charges which were calculated according to the 'physical path methodology' devised by the BNetzA. That methodology took account of the network costs caused by non-peak consumers and baseload consumers, with a minimum charge of at least 20% of the published general charges ('the minimum charge'). That minimum charge guaranteed remuneration for the operation of the network to which those consumers were connected in the event that the individual charges calculated using the physical path methodology were lower than that minimum charge or close to zero.

The measures at issue

15 In accordance with the second and third sentences of Paragraph 19(2) of the 2005 StromNEV Regulation, as amended by the 2011 EnWG, as of 1 January 2011, the date of the retroactive application of that provision, the individual charges for baseload consumers were abolished and replaced by a full exemption from network charges ('the exemption at issue'), granted by way of an authorisation from the competent regulatory authority, namely the BNetzA or the regulatory authority of the Land concerned. The cost of that exemption was borne by the transmission system operators or the distribution system operators depending on the network level to which the beneficiaries were connected.

16 Under the sixth and seventh sentences of Paragraph 19(2) of the 2005 StromNEV Regulation, as amended by the 2011 EnWG, the transmission system operators were required to compensate the distribution system operators for losses in revenue resulting from the exemption at issue and had to offset among themselves the costs of that exemption by means of a financial offset under Paragraph 9 of the Kraft-Wärme-Kopplungsgesetz (Law on combined heat and power generation) of 19 March 2002 (BGBl. 2002 I, p. 1092), in such a way that each of them bore the same financial burden in proportion to the quantity of electricity supplied to the end users connected to their respective network.

17 From 2012, the decision of the BNetzA of 14 December 2011 (BK8-11-024; 'the 2011 BNetzA decision') introduced a financing mechanism. Under that mechanism, the distribution system operators collected from end users or electricity suppliers a surcharge ('the surcharge at issue') the amount of which was transferred to the transmission system operators in order to offset the loss in revenue resulting from the exemption at issue.

18 The amount of the surcharge at issue was calculated each year in advance by the transmission system operators, using a methodology established by the BNetzA. The amount in respect of 2012, the first year in which the mechanism was implemented, was set directly by the BNetzA.

19 Those provisions did not apply to the costs of the exemption at issue in respect of 2011, and therefore each transmission system operator and distribution system operator had to bear the losses relating to that exemption in respect of that year.

The system of network charges subsequent to the measures at issue

20 During the administrative procedure which led to the decision at issue, the exemption at issue was first declared null and void by judicial decisions of the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany) of 8 May 2013 and of the Bundesgerichtshof (Federal Court of Justice, Germany) of 6 October 2015. That exemption was then repealed, with effect from 1 January 2014, by the 2005 StromNEV Regulation, as amended by the Verordnung zur Änderung von Verordnungen auf dem Gebiet des Energiewirtschaftsrechts (Regulation amending energy regulations) of 14 August 2013 (BGBl. 2013 I, p. 3250) ('the 2013 StromNEV Regulation'). The 2013 StromNEV Regulation reintroduced, for the future, individual charges calculated using the physical path methodology, with the application, instead of the minimum charge, of flat-rate charges amounting to 10%, 15% and 20% of the general charges, based on electricity consumption (7 000, 7 500 and 8 000 hours of annual network usage, respectively).

21 The 2013 StromNEV Regulation introduced a transitional scheme, in force with effect from 22 August 2013 and applicable retroactively to baseload consumers which had not yet benefited from the exemption at issue in respect of 2012 and 2013. Instead of the individual charges calculated using the physical path methodology and the minimum charge, that scheme provided exclusively for the application of those flat-rate charges to those consumers.

The administrative procedure and the decision at issue

22 Following a number of complaints, on 4 May 2013 the Commission published its decision to initiate the procedure under Article 108(2) TFEU concerning the aid scheme based on the measures at issue (OJ 2013 C 128, p. 43).

23 Following a procedure during which the Federal Republic of Germany and other interested parties submitted their comments, the Commission adopted the decision at issue on 28 May 2018.

24 By that decision, the Commission concluded that, during the period from 1 January 2012 to 31 December 2013, the Federal Republic of Germany had unlawfully granted State aid in the form of the exemption at issue.

25 More specifically, the Commission found that the amount of the State aid corresponded to the network costs caused by the exempted baseload consumers in 2012 and 2013 or, where those costs amounted to less than the minimum charge, to that minimum charge.

26 In addition, the Commission found that the aid in question was incompatible with the internal market, since it did not meet the conditions of any of the derogations provided for in Article 107(2) and (3) TFEU and could not be considered to be compatible for any other reason.

27 The Commission therefore decided as follows:

– the exemption at issue constituted State aid within the meaning of Article 107(1) TFEU in so far as baseload consumers had been exempted from paying network charges corresponding to the network costs caused by them or from paying the minimum charge where those network costs amounted to less than that charge;

– the aid in question had been put into effect by the Federal Republic of Germany in breach of Article 108(3) TFEU and was incompatible with the internal market;

– the individual aid granted under the scheme in question did not constitute State aid if, at the time it was granted, it fulfilled the conditions laid down by a 'de minimis' aid regulation adopted pursuant to Article 2 of Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles [107] and [108 TFEU] to certain categories of horizontal State aid (OJ 1998 L 142, p. 1); and

– the Federal Republic of Germany was required, first, to recover from the beneficiaries the aid that was incompatible with the internal market, granted under the aid scheme in question, including interest, and, second, to cancel all outstanding payments of aid under that scheme with effect from the date of the adoption of the decision at issue.

The actions before the General Court and the judgment under appeal

28 By applications lodged at the Registry of the General Court on 9 April 2019, the Infineon companies each brought an action for annulment of the decision at issue.

29 By decision of the President of the Sixth Chamber of the General Court of 15 May 2019, Cases T-233/19 and T-234/19 were joined.

30 By decision of the President of the Sixth Chamber of the General Court of 30 August 2019, the Federal Republic of Germany was granted leave to intervene in support of the form of order sought by the Infineon companies, in accordance with that Member State's request.

31 In support of their actions, the Infineon companies put forward a single plea in law, alleging that there was no State aid within the meaning of Article 107(1) TFEU in so far as the exemption at issue was not financed through State resources.

32 By the judgment under appeal, the General Court declared the actions to be admissible, then it rejected that plea and, consequently, dismissed the actions for annulment in their entirety.

Procedure before the Court and forms of order sought

33 By its appeal in Case C-794/21 P, the Federal Republic of Germany claims that the Court should:

– set aside the judgment under appeal in so far as it dismissed the action for annulment as unfounded;

– annul the decision at issue; and

– order the Commission to pay the costs incurred before the General Court and the Court of Justice.

34 The Infineon companies contend that the Court should uphold the appeal in Case C-794/21 P.

35 The Commission contends that the Court should dismiss the appeal in Case C-794/21 P and order the Federal Republic of Germany to pay the costs.

36 By their appeal in Case C-800/21 P, the Infineon companies claim that the Court should:

– set aside the judgment under appeal;

– annul the decision at issue or, in the alternative, refer the case back to the General Court; and

– order the Commission to pay the costs incurred before the General Court and the Court of Justice.

37 The Federal Republic of Germany contends that the Court should uphold the appeal in Case C-800/21 P and order the Commission to pay the costs.

38 The Commission contends that the Court should dismiss the appeal in Case C-800/21 P and order the Infineon companies to pay the costs.

39 By its cross-appeals in Cases C-794/21 P and C-800/21 P, the Commission claims that the Court should:

– set aside the judgment under appeal;

– declare the actions for annulment in Joined Cases T-233/19 and T-234/19 to be inadmissible;

– in Case C-794/21 P, order the Federal Republic of Germany to pay the costs incurred before the Court of Justice and order the Infineon companies to pay the costs incurred before the General Court; and

– in Case C-800/21 P, order the Infineon companies to pay the costs incurred before the Court of Justice and the General Court.

40 The Infineon companies and the Federal Republic of Germany contend that the cross-appeals should be dismissed and that the Commission should be ordered to pay the costs.

41 By decision of the President of the Court of 18 April 2023, Cases C-794/21 P and C-800/21 P were joined for the purposes of the oral procedure and the judgment.

The main appeals

42 The cross-appeals lodged by the Commission seek to challenge the admissibility of the action at first instance, which is a preliminary issue as far as the substantive issues raised in the main appeals are concerned. The cross-appeals should therefore be examined first (see, to that effect, judgment of 3 December 2020, *Changmao Biochemical Engineering* v *Distillerie Bonollo and Others*, C-461/18 P, EU:C:2020:979, paragraph 43).

43 In support of its cross-appeals, the Commission puts forward two grounds of appeal.

The first ground of appeal

Arguments of the parties

44 By the first ground of appeal put forward in support of its cross-appeals, the Commission submits that the General Court erred in law, in paragraphs 37 to 44 of the judgment under appeal, by adopting a broad interpretation of the concept of 'publication' within the meaning of the sixth paragraph of Article 263 TFEU. It maintains that the General Court thus incorrectly held that any publication in the Official Journal comes under that concept, irrespective of whether such publication is a precondition for the entry into force of the measure in question in accordance with Article 297 TFEU and whether it is provided for in the Treaty itself.

45 The Commission submits that, in the first place, the General Court's interpretation is contrary to the case-law of the Court of Justice as it emerges from the judgment of 17 May 2017, *Portugal* v *Commission* (C-339/16 P, EU:C:2017:384, paragraphs 34 to 40), and from the orders of 31 January 2019, *Iordăchescu* v *Parliament and Others* (C-426/18 P, EU:C:2019:89, paragraph 22), and of 5 September 2019, *Fryč* v *Commission* (C-230/19 P, EU:C:2019:685, paragraph 15). It argues that, by that case-law, the Court of Justice has established a parallel between the sixth paragraph of Article 263 TFEU and Article 297 TFEU, in that the publication of the measure in question constitutes the starting point of the time limit for bringing proceedings only if it is a precondition for the entry into force of that measure and if it is provided for in the Treaty itself.

46 The Commission maintains that that approach is confirmed by a literal, contextual and teleological interpretation of the sixth paragraph of Article 263 TFEU.

47 As regards, first, the wording of that provision, the Commission submits that, in all the language versions, with the exception of the German-language version, the terms 'publication' and 'notification' appear both in the sixth paragraph of Article 263 TFEU and in Article 297 TFEU, which demonstrates a parallel between those two provisions.

48 As regards, second, the spirit and purpose of the sixth paragraph of Article 263 TFEU, the Commission maintains that the time limits for bringing proceedings laid down in that provision contribute to the objective of legal certainty. It argues that, if a person wishes to challenge a measure, he, she or it must in principle do so within two months of the date on which the final version of the content of the measure came to that person's knowledge. By contrast, it asserts, in the case of measures of general application which do not specify to whom they are addressed, that date is the date of publication in the Official Journal. In the case of measures which specify to whom they are addressed, that date is the date of notification to that addressee. It is only on an exceptional and subsidiary basis that, in the case of a measure which does not have to be published or notified, the point at which that measure came to the knowledge of the person concerned may constitute an event triggering the time limit for bringing proceedings. Thus, the parallel between the sixth paragraph of Article 263 TFEU and Article 297 TFEU ensures that the subsequent publication of a measure in the Official Journal for information purposes does not lead to an extension of the time limits for bringing proceedings and, therefore, to legal uncertainty.

49 The Commission submits that, in the second place, the publication in the Official Journal of a Commission decision to close a formal investigation procedure cannot be regarded as equivalent to 'publication' within the meaning of the second subparagraph of Article 297(2) TFEU. Such publication does not therefore constitute the starting point of the time limit for bringing proceedings.

50 According to the Commission, such a decision is addressed to the Member State concerned and is notified only to that Member State. It submits that, in accordance with the third subparagraph of Article 297(2) TFEU, that decision is to take effect upon such notification and not upon its publication in the Official Journal, which is intended only to inform the public, including the beneficiaries of aid from which the Member State concerned must recover such aid even before the publication of the decision. The Commission maintains, moreover, that such publication is based not on the FEU Treaty, but on Article 32 of Regulation 2015/1589, read in the light of recital 39 thereof. It argues that, in those circumstances, in order to determine the starting point of the time limit for bringing proceedings applicable to an undertaking in receipt of aid for the purpose of challenging a decision to close the formal investigation procedure, it is necessary to rely on the point at which that decision actually came to the knowledge of the person concerned. It submits that, where it cannot be demonstrated that the measure had previously come to the knowledge of the person concerned, the date on which the measure was published in the Official Journal serves, on the basis of a legal fiction, as the point at which that measure actually came to the knowledge of the person concerned.

51 In the third place, the Commission puts forward a series of arguments which, in its submission, support its interpretation of the sixth paragraph of Article 263 TFEU.

52 First, it relies on the scheme of that provision in order to argue that the publication and notification of a measure are placed on an equal footing and that the point at which that measure comes to the knowledge of the person concerned constitutes an event which is subsidiary to publication and notification. It submits that that relationship of subsidiarity is severed by the General Court's interpretation, since, if publication under Article 32 of Regulation 2015/1589

was tantamount to publication under Article 297(1) TFEU, the time limit for bringing proceedings would have to start to run, including with regard to the Member State concerned and notwithstanding notification, on the date of such publication.

53 Second, the Commission submits that the interpretation adopted by the General Court results in inequality of arms between undertakings from which aid is recovered and their competitors which have not received aid. It states that, while the former in practice receive a copy of the decision from the Member State concerned, the latter have to wait for the publication of the decision in the Official Journal, in accordance with Article 32 of Regulation 2015/1589, with the result that the effective time limits for those undertakings to bring proceedings are different. It argues that that interpretation also results in inequality between the Commission and undertakings from which aid must be recovered. In order to respond to an action brought by an undertaking in receipt of aid, the Commission has a period of two months whereas, by virtue of that interpretation, those undertakings have a longer period in which to prepare their action.

54 Third, the Commission submits that the General Court relied on a misreading of the judgment of 10 March 1998, *Germany* v *Council* (C-122/95, EU:C:1998:94). It argues that, unlike the decision at issue, the relevant decision in the case which gave rise to that judgment did not specify to whom that decision was addressed.

55 Fourth, the Commission submits that paragraph 39 of the judgment under appeal, in which the General Court held that the Infineon companies could subjectively expect the decision at issue to be published in the Official Journal, fails to have regard to the mandatory nature of the time limits for bringing proceedings.

56 The Federal Republic of Germany and the Infineon companies contend that the first ground of appeal is unfounded.

Findings of the Court

57 By the first ground put forward in support of its cross-appeals, the Commission disputes the merits of the General Court's assessments in paragraphs 37 to 44 of the judgment under appeal. It submits that, contrary to what the General Court held in those paragraphs, the time limit for bringing an action for annulment of the decision at issue ran, for the Infineon companies, not from the date of publication of that decision in the Official Journal, but from the date on which that decision actually came to the knowledge of those companies.

58 In that regard, it should be noted that, in paragraphs 37 to 44 of the judgment under appeal, the General Court dismissed the Commission's plea of inadmissibility alleging that the action for annulment of the decision at issue brought by the Infineon companies was out of time.

59 It is apparent from a reading of paragraphs 37 to 39 of that judgment as a whole that the General Court considered that the time limit for bringing proceedings ran, in the present case, from the date of publication of the decision at issue in the Official Journal, which took place on 16 January 2019, and that that time limit was observed.

60 In support of that consideration, the General Court observed, in paragraph 38 of that judgment, that the criterion of the date on which the measure came to the knowledge of the applicant as the starting point of that time limit is subsidiary to the criteria of publication or notification of the measure. While pointing out that publication was not a precondition for the decision at issue to

come into effect, it found, in paragraph 39 of the judgment under appeal, that that decision had to be published in the Official Journal in accordance with Article 32(3) of Regulation 2015/1589, such that the Infineon companies could legitimately expect that decision to be published.

61 In that regard, it should be recalled that, according to the sixth paragraph of Article 263 TFEU, 'the proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be'.

62 It is clear from the wording of that provision, in particular from the terms 'as the case may be' and 'in the absence thereof', that the starting point of the time limit for bringing proceedings is determined by reference to the situation in question and that the three criteria capable of triggering that time limit are hierarchical.

63 Thus, the time limit for bringing an action for annulment starts to run, primarily, from the publication of the measure or from its notification to the applicant. Those two primary criteria are placed, in the scheme of that provision, on an equal footing in that neither of those criteria is subsidiary to the other (see, to that effect, judgment of 17 May 2017, *Portugal* v *Commission*, C-339/16 P, EU:C:2017:384, paragraph 38).

64 By contrast, as the General Court correctly observed in paragraph 38 of the judgment under appeal, the criterion of the date on which the measure being contested came to the knowledge of the applicant as the starting point of the time limit for bringing an action is subsidiary to the criteria of publication or notification of that measure (see, to that effect, judgment of 10 March 1998, *Germany* v *Council*, C-122/95, EU:C:1998:94, paragraph 35), which, moreover, is not disputed in the present case.

65 In the present case, the decision at issue, which closes a formal investigation procedure relating to State aid, was addressed to the Member State concerned, namely the Federal Republic of Germany, and was notified to that Member State, in accordance with the third subparagraph of Article 297(2) TFEU. Accordingly, that decision was published in the Official Journal, in accordance with Article 32(3) of Regulation 2015/1589.

66 In such a situation, it is clear from the case-law of the Court that, for the addressee of the measure to which it was to be notified, namely the Member State concerned, the time limit for bringing an action for annulment runs from the date of that notification, even if the measure is also published in the Official Journal (see, to that effect, judgment of 17 May 2017, *Portugal* v *Commission*, C-339/16 P, EU:C:2017:384, paragraph 37).

67 By contrast, it follows from a literal, teleological and contextual interpretation of the sixth paragraph of Article 263 TFEU, read in the light of the case-law of the Court, that the time limit for bringing an action for annulment runs, for other interested parties such as the Infineon companies, from the publication of the measure in the Official Journal, including where that publication is based not on the second subparagraph of Article 297(2) TFEU, but on a provision of secondary legislation, such as Article 32(3) of Regulation 2015/1589.

68 First, it must be stated that the wording of the sixth paragraph of Article 263 TFEU refers to the 'publication' of measures in general (see, to that effect, judgment of 26 September 2013, *PPG and SNF* v *ECHA*, C-625/11 P, EU:C:2013:594, paragraph 31). Thus, that wording does not attach any specific condition to that concept, in particular as regards the legal basis of the obligation to publish.

69 On that point, it is true that, as the Commission claims, the Court has, inter alia, held that the concept of 'publication', within the meaning of the sixth paragraph of Article 263 TFEU, refers to publication in the Official Journal which is a precondition for the entry into force of the measure and is provided for in the FEU Treaty (see, to that effect, judgment of 17 May 2017, *Portugal* v *Commission*, C-339/16 P, EU:C:2017:384, paragraph 36; orders of 31 January 2019, *Iordăchescu* v *Parliament and Others*, C-426/18 P, EU:C:2019:89, paragraph 22, and of 5 September 2019, *Fryč* v *Commission*, C-230/19 P, EU:C:2019:685, paragraph 15).

70 However, contrary to the Commission's assertion, it cannot be inferred from this that the concept of 'publication', within the meaning of the sixth paragraph of Article 263 TFEU, is limited to that situation.

71 The precedents cited in paragraph 69 of the present judgment cannot be read in isolation, but form part of the case-law of the Court which has interpreted broadly the concept of 'publication' within the meaning of the sixth paragraph of Article 263 TFEU. Thus, in addition to the situation referred to in paragraph 69 above, that concept covers publication of the measure being contested in the Official Journal which is based not on an obligation imposed by the Treaty, but on the established practice of the EU institutions (see, to that effect, judgment of 10 March 1998, *Germany* v *Council*, C-122/95, EU:C:1998:94, paragraphs 36 and 39) or on a provision of secondary legislation, such as Article 32(3) of Regulation 2015/1589 (see, to that effect, order of 25 November 2008, *S.A.BA.R.* v *Commission*, C-501/07 P, EU:C:2008:652, paragraph 23); it also covers publication on the website of an EU institution, body, office or agency where such publication is provided for under secondary legislation (see, to that effect, judgment of 26 September 2013, *PPG and SNF* v *ECHA*, C 625/11 P, EU:C:2013:594, paragraphs 30 to 32).

72 Second, as regards the objectives of the sixth paragraph of Article 263 TFEU, it should be borne in mind that, according to settled case-law, the time limits for bringing proceedings under that provision are a matter of public policy and are not subject to the discretion of the parties or the Court. They were established with the aim of safeguarding legal certainty by preventing EU measures which produce legal effects from being called in question indefinitely and of avoiding any discrimination or arbitrary treatment in the administration of justice (see, to that effect, judgments of 12 December 1967, *Muller-Collignon* v *Commission*, 4/67, EU:C:1967:51, p. 372, and of 23 January 1997, *Coen*, C-246/95, EU:C:1997:33, paragraph 21; orders of 16 November 2010, *Internationale Fruchtimport Gesellschaft Weichert* v *Commission*, C-73/10 P, EU:C:2010:684, paragraph 52, and of 31 January 2019, *Iordăchescu* v *Parliament and Others*, C-426/18 P, EU:C:2019:89, paragraph 21).

73 As regards a decision such as the decision at issue, which closes a formal investigation procedure relating to State aid, it appears that, unlike the date on which it came to the knowledge of the person concerned, the date of publication of a measure in the Official Journal can, in the interests of legal certainty, be established objectively and with certainty in respect of all interested parties to which that decision has not been notified. In that regard, it is immaterial whether those interested parties may have become aware of that measure prior to its publication.

74 In addition, that explains why, in the general scheme of the sixth paragraph of Article 263 TFEU and in the interests of legal certainty, the date of publication takes precedence over the date on which the measure came to the knowledge of the person concerned, which, as has been recalled in paragraph 64 of the present judgment, is a subsidiary criterion in terms of when the time limit for bringing proceedings starts to run. It is therefore not possible to accept the Commission's argument when, in actual fact, it suggests reversing the relationship between those two criteria referred to in the sixth paragraph of Article 263 TFEU.

75 Moreover, contrary to the Commission's assertions, the interpretation adopted in paragraphs 67 and 71 of the present judgment is also such as to avoid any discrimination or arbitrary treatment in the administration of justice and thus to ensure equality of arms between beneficiaries of State aid and competing undertakings. For all those interested parties, the time limit for bringing proceedings starts to run from the same date, namely the date on which the decision was published in the Official Journal. Furthermore, inasmuch as the Commission is the author of such a decision and is responsible for its publication in the Official Journal, it cannot validly put forward an argument alleging inequality of arms to its detriment.

76 Third, as regards the context, the structure of the Treaties also militates against the strict parallel, suggested by the Commission, between the concepts of 'publication' used in the sixth paragraph of Article 263 TFEU and in the second subparagraph of Article 297(2) TFEU, respectively. It is sufficient to state, in that regard, that, although those two provisions come under Title I of Part Six of the FEU Treaty, they do not govern the same subject matter. While the first provision is contained in Chapter 1 of that title, which is devoted to the institutions, and, more specifically, in Section 5 of that chapter, which is devoted to the Court of Justice of the European Union, the second provision comes under Chapter 2 of that title, which deals with the legal acts of the European Union and their adoption procedures.

77 For all those reasons, the Court finds that the General Court correctly held, in paragraphs 37 to 44 of the judgment under appeal, that the time limit for bringing proceedings started to run, for the Infineon companies, on the date of publication of the decision at issue in the Official Journal.

78 Accordingly, the first ground of appeal put forward in support of the cross-appeals must be rejected as unfounded.

The second ground of appeal

Arguments of the parties

79 By the second ground of appeal put forward in support of its cross-appeals, the Commission alleges that the General Court made an error of law in paragraph 42 of the judgment under appeal.

80 It maintains that, by stating, in paragraph 42 of that judgment, that 'it has not been demonstrated that, in the present case, the [Infineon companies] took "due cognisance" of the decision [at issue]' prior to the publication of that decision, the General Court distorted the facts and evidence. It argues that it is clear, in the light of the evidence put forward by the Commission before the General Court, that the existence of the decision at issue had come to the knowledge of those companies prior to its publication in the Official Journal, at the latest by 26 September 2018.

81 The Federal Republic of Germany contends that, since the first ground of the cross-appeals is unfounded, the second ground of appeal is irrelevant to the outcome of the present appeals. The Infineon companies contend that the second ground of appeal is unfounded.

Findings of the Court

82 In paragraph 42 of the judgment under appeal, the General Court observed that 'in any event, it has not been demonstrated that, in the present case, the [Infineon companies] took "due cognisance" of the decision [at issue]'.

83 In that regard, the term 'in any event' indicates that that ground was included in the judgment under appeal purely for the sake of completeness. According to settled case-law, arguments directed against grounds included in a decision of the General Court purely for the sake of completeness cannot lead to the decision being set aside and are therefore ineffective (judgment of 21 December 2023, *United Parcel Service* v *Commission*, C-297/22 P, EU:C:2023:1027, paragraph 55 and the case-law cited).

84 Accordingly, the second ground of appeal put forward in support of the cross-appeals must be rejected as ineffective.

85 Consequently, the cross-appeals must be dismissed in their entirety.

The main appeals

86 In support of its appeal in Case C-794/21 P, the Federal Republic of Germany, supported by the Infineon companies, puts forward a single ground of appeal, alleging infringement of Article 107(1) TFEU.

87 In support of their appeal in Case C-800/21 P, the Infineon companies put forward two grounds of appeal, alleging (i) infringement of Article 107(1) TFEU, and (ii) distortions of national law and of the facts. The Federal Republic of Germany supports the first ground of appeal put forward by the Infineon companies.

The single ground of appeal in Case C-794/21 P and the first ground of appeal in Case C-800/21 P

88 By the single ground of appeal in Case C-794/21 P and by the first ground of appeal in Case C-800/21 P, respectively, the Federal Republic of Germany and the Infineon companies claim that the General Court infringed Article 107(1) TFEU inasmuch as it erred in holding that the exemption at issue constitutes aid granted through 'State resources' within the meaning of that provision.

89 The single ground of appeal put forward by the Federal Republic of Germany is divided into three parts which concern (i) the legal test for assessing whether a measure granted through 'State resources' exists; (ii) the existence of a compulsory charge, and (iii) State control.

90 The first ground of appeal put forward by the Infineon companies may be divided into four complaints, the first three of which concern, in essence, the legal test referred to in the preceding paragraph, while the fourth concerns the existence of a compulsory charge.

The legal test for assessing whether a measure granted through 'State resources' exists

– *Arguments of the parties*

91 The Federal Republic of Germany, by the first part of its single ground of appeal, and the Infineon companies, by the first three complaints of their first ground of appeal, claim, in essence, that the General Court applied an incorrect legal test in order to assess whether the resources at issue were State resources.

92 In the first place, in its written pleadings lodged before the Court of Justice, the Federal Republic of Germany contested paragraphs 63 to 65 and 77 of the judgment under appeal on the ground that the General Court erred in holding that, for the purpose of determining whether or not resources are State resources, the existence of a compulsory charge on end consumers or customers and State control over the funds or the administrators of those funds are two factors which 'together form an alternative', with the result that it was sufficient for that court to ascertain whether the surcharge at issue was a compulsory charge which could be treated in the same way as a parafiscal charge. They submit that, on the contrary, these are cumulative criteria, as is apparent from the case-law arising, inter alia, from the judgments of 17 July 2008, *Essent Netwerk Noord and Others* (C-206/06, EU:C:2008:413, paragraphs 66, 69, 70, 72 and 75); of 28 March 2019, *Germany* v *Commission* (C-405/16 P, EU:C:2019:268, paragraph 72); of 15 May 2019, *Achema and Others* (C-706/17, EU:C:2019:407); and of 16 September 2021, *FVE Holýšov I and Others* v *Commission* (C-850/19 P, EU:C:2021:740).

93 In addition, according to the Federal Republic of Germany, that interpretation by the General Court, based on alternative criteria, contradicts paragraphs 98 to 110 of the judgment under appeal, in which the General Court assessed whether State control existed, even though it had already concluded that a compulsory charge existed.

94 In the second place, according to the Federal Republic of Germany, that approach adopted by the General Court is also not supported by Articles 30 and 110 TFEU, which essentially concern the removal and prohibition of protectionist measures.

95 In the third place, the Federal Republic of Germany submits that the interpretation of Article 107(1) TFEU according to which it must be presumed that any charge has its origin in the State, irrespective of the objectives pursued by that provision, is incorrect in law. It maintains that that interpretation would lead to a consequence not envisaged in the Treaties, namely that any regulation of market prices would result in use of State resources and would therefore have to be notified, in accordance with Article 108 TFEU. It argues that such regulation falls within the scope of the free movement of goods and not the rules on State aid.

96 For their part, the Infineon companies complain that the General Court incorrectly relied, in paragraph 63 of the judgment under appeal, on two main factors in assessing whether the resources were State resources, namely, first, the existence of a compulsory charge on end consumers or customers and, second, State control over the administration of the system.

97 In support of that assertion, those companies emphasise, in the first place, that it is settled case-law that only aid the financing of which 'costs the State money' constitutes aid granted through 'State resources' within the meaning of Article 107(1) TFEU. According to them, it is therefore not sufficient for a State measure to prescribe the compulsory use of private resources.

98 In the second place, those companies submit that the relevant criterion for distinguishing State resources from private resources consists in the existence of a sufficiently direct link with the State budget. They maintain that a compulsory redistribution of private resources, imposed through State measures, should not, in the absence of such a link, fall within the concept of 'State resources'.

99 In the third place, they submit that the existence of that link must be established on a case-by-case basis in the light of the case-law of the Court of Justice, which the General Court disregarded. They maintain that, according to that case-law, such a link exists where the State makes use of public powers in order to levy a compulsory contribution, for instance where it directly fixes the amount of that contribution by law in respect of the persons liable to pay such a contribution or provides for administrative penalties in the event of failure to comply with the obligation to pay. A link could also be established where any surplus funds collected must be paid into the State budget where the State provides a public guarantee or where the company administering the funds belongs to the State. They argue that, conversely, a sufficiently direct link between the compulsory contribution and the State budget is lacking where the State does not relinquish any resources or where the compulsory charges remain private in nature throughout their lifecycle. They submit that, contrary to what the General Court held in paragraph 77 of the judgment under appeal, a mandatory system established by law is therefore not sufficient for the purpose of concluding that 'State resources' exist within the meaning of Article 107(1) TFEU.

100 The Commission contends that the first part of the single ground of appeal put forward by the Federal Republic of Germany is, as such, ineffective. It maintains that the first three complaints of the first ground of appeal put forward by the Infineon companies seek only to set out those companies' interpretation – which, in any event, is incorrect – of the case-law of the Court and should be examined together with the fourth complaint of that ground of appeal.

– *Findings of the Court*

101 The Federal Republic of Germany and the Infineon companies complain, in essence, that the General Court applied an incorrect legal test in order to determine whether the amounts resulting from the surcharge at issue have their origin in 'State resources' within the meaning of Article 107(1) TFEU.

102 According to settled case-law, classification as 'State aid' within the meaning of Article 107(1) TFEU requires four conditions to be satisfied, namely, that there be intervention by the State or 'through State resources', that the intervention be liable to affect trade between Member States, that that intervention confer a selective advantage on the beneficiary and that the same intervention distort or threaten to distort competition (judgment of 12 January 2023, *DOBELES HES*, C-702/20 and C-17/21, EU:C:2023:1, paragraph 31 and the case-law cited).

103 As regards the first of those conditions, it is settled case-law that a measure may be classified as an intervention by the State or as aid granted 'through State resources' if, first, the measure is granted directly or indirectly through those resources and, second, the measure is imputable to a Member State (judgment of 12 January 2023, *DOBELES HES*, C-702/20 and C-17/21, EU:C:2023:1, paragraph 32 and the case-law cited).

104 As regards, more specifically, the condition that the advantage be granted 'through State resources', the Court has, in its case-law, identified two criteria for establishing that the funds by means of which a tariff advantage is granted under national legislation constitute 'State resources' within the meaning of Article 107(1) TFEU (see, to that effect, judgment of 12 January 2023, *DOBELES HES*, C-702/20 and C-17/21, EU:C:2023:1, paragraphs 34, 38, 39 and 42).

105 Thus, in the first place, funds financed by a charge or other compulsory surcharges under national legislation and managed and apportioned in accordance with that legislation constitute 'State resources' within the meaning of Article 107(1) TFEU (judgment of 12 January 2023, *DOBELES HES*, C-702/20 and C-17/21, EU:C:2023:1, paragraph 38).

106 According to the Court's case-law clarifying that criterion, amounts resulting from the price surcharge imposed by the State on purchasers of electricity are similar to a charge which is levied on electricity and have their origin in 'State resources' within the meaning of Article 107(1) TFEU. In order to be regarded as such, the funds must derive from compulsory contributions imposed by the legislation of the Member State concerned and must be managed and apportioned in accordance with that legislation, irrespective of whether the financing mechanism falls, strictly speaking, within the category of fiscal surcharges under national law. By contrast, it is not sufficient that the network operators pass on in the electricity sale price to their end customers the additional costs caused by their obligation to purchase electricity generated from certain energy sources at the statutory rates, where that offsetting is the result not of a legal obligation, but only of a practice. In such a case, the surcharge could not be regarded as compulsory (see, to that effect, judgment of 12 January 2023, *DOBELES HES*, C-702/20 and C-17/21, EU:C:2023:1, paragraphs 34 to 37 and the case-law cited).

107 In the second place, the fact that sums constantly remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as 'State resources' within the meaning of that provision (judgment of 12 January 2023, *DOBELES HES*, C-702/20 and C-17/21, EU:C:2023:1, paragraph 39 and the case-law cited).

108 The criteria referred to in paragraphs 105 and 107 of the present judgment constitute alternative criteria for establishing that a measure is granted 'through State resources' within the meaning of Article 107(1) TFEU (see, to that effect, judgment of 12 January 2023, *DOBELES HES*, C-702/20 and C-17/21, EU:C:2023:1, paragraph 42), as the Federal Republic of Germany acknowledged at the hearing in response to a question from the Court regarding the scope of the judgment of 12 January 2023, *DOBELES HES* (C-702/20 and C-17/21, EU:C:2023:1).

109 It follows, first, that the General Court did not err in law when, in paragraphs 63 to 65 and 77 of the judgment under appeal, it held that the nature of the resources as State resources, for the purposes of Article 107(1) TFEU, may be established by means of two alternative conditions, one relating to the existence of a compulsory charge on end consumers or customers and the other to State control over the administration of the scheme and, in particular, over funds or the

administrators of those funds. In the light of the replies given by the Federal Republic of Germany at the hearing, all the arguments put forward by that Member State challenging that assessment must be rejected.

110 Moreover, in so far as the Infineon companies claim, in essence, that the General Court should have applied a criterion relating to the existence of a sufficiently direct link between the State budget and the surcharge at issue, it must be stated that, in accordance with the case-law of the Court of Justice set out in paragraphs 105 to 107 of the present judgment, none of the alternatives correctly relied on by the General Court refers to such a criterion. In the context of the present appeals, those companies dispute only the existence of a compulsory charge, for the purposes of the case-law referred to in paragraph 105 of the present judgment, which must be assessed in the light of the factors set out in paragraph 106 thereof. Those factors have been established by the case-law of the Court of Justice referred to in paragraphs 55 to 62 of the judgment under appeal and summarised in paragraphs 34 to 37 of the judgment of 12 January 2023, *DOBELES HES* (C-702/20 and C-17/21, EU:C:2023:1), without this being specifically challenged in the context of the present appeals. The Infineon companies do not demonstrate or even allege that the General Court failed to take proper account of those factors. In any event, it must be added that, as is apparent from paragraphs 77 and 78 of the judgment under appeal, the General Court did indeed seek to determine, on the basis of that case-law, whether the surcharge at issue was imposed by the State and was passed on entirely, under a legal obligation, to the persons ultimately liable for payment of that surcharge.

111 Second, contrary to what the Federal Republic of Germany claims, the General Court cannot be criticised for having considered it appropriate to examine, in paragraphs 98 to 110 of the judgment under appeal, whether there was State control over the funds collected by way of the surcharge at issue or over the network operators, after having found, in paragraph 97 of that judgment, that there was a parafiscal charge or a compulsory charge involving the use of State resources.

112 It is true that the General Court could have dispensed with that examination of whether State control existed, given the alternative nature of the two criteria which it examined. However, nothing precludes the General Court, inter alia on grounds relating to the sound administration of justice, from pursuing its reasoning with considerations that are included purely for the sake of completeness, such as, in the present case, considerations relating to the existence of State control, in the same way as the Court of Justice did in paragraph 41 of the judgment of 12 January 2023, *DOBELES HES* (C-702/20 and C-17/21, EU:C:2023:1).

113 Third, in so far as the Federal Republic of Germany argues that it would be contrary to the objectives of Article 107(1) TFEU to presume that any charge has its origin in the State, its line of argument is based on an incorrect premiss and a misreading of the judgment under appeal.

114 As is apparent from paragraph 105 of the present judgment, it is not the funds financed by any charge but only those that are financed by a compulsory charge, provided for under national legislation, and managed and apportioned in accordance with that legislation, which are capable of constituting ‘State resources’ within the meaning of that provision. Moreover, as noted in paragraph 110 of the present judgment, the General Court, as is apparent from paragraphs 77 and 78 of the judgment under appeal, specifically sought to determine whether the surcharge at issue was imposed by the State and was passed on entirely, under a legal obligation, to the persons ultimately liable for payment of that surcharge.

115 Fourth, as regards the line of argument put forward by the Federal Republic of Germany concerning Articles 30 and 110 TFEU, it must be stated that, in paragraph 86 of the judgment under appeal, the General Court, in a ground included purely for the sake of completeness which is introduced by the adverbial phrase 'furthermore', took into account the case-law relating to those provisions. It inferred from this that the identity of the person liable for payment of the charge is of little account in so far as the charge relates to the product in question or to a necessary activity in connection with that product. It added that the decisive factor is therefore that the undertakings which levied the charge are not merely bound by an obligation to purchase by means of their own financial resources, but are appointed by the State to administer a State resource.

116 Since that paragraph sets out a ground included purely for the sake of completeness, the line of argument contesting it is ineffective.

117 In any event, the Court finds that the General Court referred to the case-law relating to Articles 30 and 110 TFEU not in order to assess the surcharge at issue in the light of those provisions, but rather to support its analysis of that surcharge in the light of Article 107(1) TFEU. Accordingly, it cannot be alleged that the General Court confused the separate legal regimes arising from the first two of those provisions of the FEU Treaty and from the third of those provisions, respectively.

118 It follows from the foregoing that the first part of the single ground of appeal put forward by the Federal Republic of Germany and the first three complaints of the first ground of appeal put forward by the Infineon companies must be rejected as, in part, ineffective and, in part, unfounded.

The existence of a compulsory charge

– *Arguments of the parties*

119 The Federal Republic of Germany, by the second part of its single ground of appeal, and the Infineon companies, by the fourth complaint of their first ground of appeal, submit, in essence, that, in paragraphs 78 to 97 of the judgment under appeal, the General Court misapplied Article 107(1) TFEU by classifying the surcharge at issue as a parafiscal charge or as a compulsory charge involving the use of 'State resources' within the meaning of that provision.

120 The Federal Republic of Germany submits that, inter alia in paragraphs 78, 83, 84 and 86 of the judgment under appeal, the General Court erred in holding that the relationship between the supplier and the end user of electricity was not decisive for the purpose of concluding that there was a compulsory charge, on the incorrect ground that the surcharge at issue is collected not for the consumption of electricity, but for the use of the network. Moreover, it maintains that, in paragraphs 85 and 87 to 90 of that judgment, the General Court erred in referring, without stating any reasons, to the obligation to collect and, on that basis, incorrectly inferred an obligation to pay the surcharge at issue provided for under national law. In the absence of any legal obligation to pay that surcharge, it could have been collected only on the basis of the rules of civil law. It argues that the reasoning used by the General Court to arrive at that finding and that inference is contrary to the case-law of the Court of Justice.

121 The Infineon companies submit that the General Court erred in considering that the surcharge at issue constituted a State resource, whereas that surcharge does not have a sufficiently direct link with the State budget and, therefore, remains a private resource.

122 Thus, they maintain, first, that there is no compulsory charge imposed by an act of public authority and no legal obligation to pay on the part of the person liable for payment of the surcharge at issue. They argue that, until 2012, the network operators were not required, but merely entitled to collect that surcharge. From that year onwards, the collection of that surcharge was regulated exclusively by the 2011 BNetzA decision, which did not give rise to any legal obligation to pay. By that decision, the State intervened only indirectly in the civil law relationship between the network operators and the network users. They also submit that, since those users are not the addressees of that decision, they are not bound by it. Moreover, those users cannot be treated in the same way as end users of electricity. Thus, the surcharge at issue, which is collected at an intermediate stage, does not constitute a compulsory charge for the end user of electricity. They claim that, in paragraph 84 of the judgment under appeal, the General Court disregarded the importance of passing that surcharge on to that end user.

123 Second, they submit that the General Court erred in concluding, in paragraph 75 of the judgment under appeal, that the invalidity of the 2011 BNetzA decision was not decisive as that decision had actually been applied. They maintain that that decision, lacking any legal basis in German law, was never valid since the Bundesgerichtshof (Federal Court of Justice) annulled it with retroactive effect from the date of its adoption. Only valid State measures enable a link with the State budget to be established. Such a link cannot be established solely on the basis of the effects produced by the 2011 BNetzA decision. Moreover, they claim that the General Court incorrectly considered the argument of the Infineon companies, relating to the invalidity of that decision and put forward in their answer to the General Court's questions, to be out of time.

124 Third, they submit that the amount of the surcharge at issue is not imposed by the State, but must be calculated by the private network operators at their own risk. As the General Court found in paragraph 95 of the judgment under appeal, the Commission acknowledged that losses resulting from bad debts in the event of the insolvency of the network user were borne by the network operator. They argue that the General Court erred in law in holding that that aspect is not essential for the purpose of determining whether State resources were involved.

125 Fourth, they submit that the surcharge at issue remains private in nature throughout its lifecycle. They maintain that the network operators collect it on the basis of the network use contract, which comes under a relationship governed by private law. No administrative penalty is provided for in the event of non-payment of that surcharge. They argue that the State does not provide any public guarantee in the event of non-payment or in situations where the resources collected are not sufficient to cover the exemptions from the network charges. The State does not have any direct or indirect powers of disposal over the amounts collected, but merely monitors the lawful use of that surcharge.

126 In response, the Commission contends that the arguments put forward by the Federal Republic of Germany are based on a misreading of the judgment under appeal and of the case-law of the Court of Justice and that they are, in any event, ineffective. It maintains that the fourth complaint of the first ground of appeal put forward by the Infineon companies is, in part, ineffective and, in any event, unfounded.

– *Findings of the Court*

127 As a preliminary point, it must be stated that the fourth complaint of the first ground of appeal put forward by the Infineon companies is ineffective. By that complaint, those companies challenge, in essence, the General Court's assessments relating to the existence of a charge or other compulsory surcharges, within the meaning of the case-law referred to in paragraph 105 of the present judgment. By contrast, those companies do not in any way challenge the General Court's assessments relating to the existence of State control, within the meaning of the case-law referred to in paragraph 107 of the present judgment, in the context of the appeal in Case C-800/21 P. Having regard to the alternative nature of those two criteria, as noted in paragraph 108 of the present judgment, the existence of State control is, by itself, sufficient to justify the conclusion that the surcharge at issue involves the use of State resources, within the meaning of Article 107(1) TFEU.

128 That said, the Infineon companies, in their response lodged in Case C-794/21 P, reiterated, in essence, the arguments underlying their fourth complaint raised in support of the first ground of their appeal in Case C-800/21 P. In Case C-794/21 P, the second part of the single ground of appeal put forward by the Federal Republic of Germany, relating to the existence of a charge or other compulsory surcharges, cannot at the outset be rejected as ineffective, since that Member State, by the third part of that ground of appeal, also challenges the assessments relating to the existence of State control. In those circumstances, it is necessary to take into account the arguments put forward by the Infineon companies in the context of Case C-794/21 P.

129 First of all, it should be recalled that, as is apparent from the case-law cited in paragraph 105 of the present judgment that funds financed by a charge or other compulsory surcharges under national legislation and managed and apportioned in accordance with that legislation constitute 'State resources' within the meaning of Article 107(1) TFEU.

130 In the present case, after assessing, in paragraphs 78 to 96 of the judgment under appeal, the surcharge at issue, the General Court concluded, in paragraph 97 of that judgment, that that surcharge involved the use of State resources. In support of that conclusion, it observed that the 2011 BNetzA decision imposed on distribution system operators an obligation to collect the surcharge at issue from the network users and to transfer the corresponding proceeds to the transmission system operators. It also considered that the mechanism of that surcharge fully compensated network operators for their losses in revenue stemming from the exemption at issue, since the amount of that surcharge was adjusted to meet the financial needs triggered by that exemption. It also pointed out that that amount was determined according to a methodology set by the 2011 BNetzA decision, while noting that, in respect of 2012, that decision set the initial amount of the abovementioned surcharge.

131 The Federal Republic of Germany and the Infineon companies dispute those assessments with four sets of arguments.

132 In the first place, it is necessary to examine the argument by which the Infineon companies criticise the General Court for having inferred the obligation to collect the surcharge at issue from the 2011 BNetzA decision, even though that decision was declared null and void by the German courts.

133 In that regard, first, in paragraph 75 of the judgment under appeal, the General Court found that the argument alleging that the 2011 BNetzA decision produced no effects was put forward out of time before that court.

134 That finding is not vitiated by any error of law.

135 It is not disputed that, before the General Court, the Infineon companies raised that argument only when replying to questions put by that court. That argument cannot, moreover, be regarded as amplifying the single plea in law put forward in the application at first instance alleging that there was no 'State aid' within the meaning of Article 107(1) TFEU, since that plea did not call into question the existence, as such, of effects produced by the 2011 BNetzA decision, but rather sought to challenge the findings which the Commission drew from that decision. Therefore, the General Court correctly applied Article 84(1) of its Rules of Procedure in finding that that argument was inadmissible since it was put forward out of time.

136 Second, in any event, the Court finds that the arguments referred to in paragraph 132 of the present judgment cannot succeed.

137 Neither the potential unlawfulness of an aid scheme, inter alia under national law, nor the annulment of that scheme can negate its classification as 'State aid' in so far as, notwithstanding such unlawfulness or annulment, such a scheme has produced effects in practice (see, to that effect, judgments of 3 March 2005, *Heiser*, C 172/03, EU:C:2005:130, paragraph 38, and of 21 December 2016, *Commission* v *Aer Lingus and Ryanair Designated Activity*, C-164/15 P and C-165/15 P, EU:C:2016:990, paragraph 69), as the General Court, in essence, correctly held in paragraph 75 of the judgment under appeal. Moreover, as the General Court also correctly observed in that paragraph, the effectiveness of the rules on State aid would be considerably weakened if their application could be excluded merely because an aid measure, which had in practice been applied, was subsequently declared void *ab initio*. Thus, it is immaterial, in that regard, that the potential annulment of the aid scheme is retroactive, since, for a certain period of time, the scheme was actually applied in practice (see, by analogy, judgment of 6 November 2012, *Commission* v *Hungary*, C-286/12, EU:C:2012:687, paragraphs 44 and 45).

138 In the second place, the Federal Republic of Germany and the Infineon companies claim that the General Court erred in finding that end users were under an obligation to pay the surcharge at issue, and submit that those users, moreover, were incorrectly defined as including the network users.

139 First, as regards the identification of the persons ultimately liable for payment of the surcharge at issue, the General Court held, in paragraph 83 of the judgment under appeal, that that surcharge concerned only the relationship between the network operators and the network users, since that surcharge is collected not for the consumption of electricity, but for the use of the network. It concluded on that basis, in paragraph 84 of that judgment, that the question as to whether the electricity suppliers were obliged in turn to pass that surcharge on to the end users of electricity was irrelevant. In its view, the persons ultimately liable for payment of the surcharge were the network users, that is to say, the suppliers themselves and the end users directly connected to the network, and not the other end users.

140 In that regard, the consideration that the surcharge at issue is collected for the use of the network and the consideration that the network users must be regarded as end users are matters of factual appraisal. It is not for the Court of Justice to review such an appraisal, in the absence of any allegation of distortion.

141 It follows from the second subparagraph of Article 256(1) TFEU and from the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union that an appeal is to be limited to points of law only. The General Court thus has exclusive jurisdiction to find and appraise the relevant facts and assess the evidence. The appraisal of those facts and the assessment of that evidence therefore do not, save where the facts and evidence are distorted, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal (judgment of 4 March 2021, *Commission* v *Fútbol Club Barcelona*, C-362/19 P, EU:C:2021:169, paragraph 46 and the case-law cited).

142 Second, as regards the existence of an obligation to pay on the part of the network users, it is apparent from paragraphs 85 and 87 to 89 of the judgment under appeal that the General Court endorsed the Commission's findings that the 2011 BNetzA decision imposed on distribution system operators an obligation to collect the surcharge at issue and to pass it on, and that that decision provided that the proceeds from that surcharge must be transferred to the various transmission system operators on a monthly basis. The General Court concluded therefrom that the surcharge at issue, introduced by an administrative authority through a regulatory measure, was binding on the network users.

143 It is therefore apparent from the findings of fact made by the General Court, which it is not for the Court of Justice to review, that the 2011 BNetzA decision required the distribution system operators to collect the surcharge at issue from the network users. It is also common ground, in the light of the findings of fact made by the General Court in paragraphs 12, 67 and 94 of the judgment under appeal, which it is not for the Court of Justice to review, that that decision laid down the methodology by which the amount of the surcharge at issue was to be calculated each year by the transmission system operators.

144 In the light of the case-law referred to in paragraph 106 of the present judgment, the Court finds that amounts resulting from a compulsory surcharge which, like the surcharge at issue, is imposed by a regulatory measure identifying the entities – even those which are private – responsible for collecting that surcharge from persons liable for payment that are also identified by that measure and defining the methodology – even if general – for calculating the amount of that surcharge and its annual adjustment, have their origin in 'State resources' within the meaning of Article 107(1) TFEU. In particular, since that surcharge has its origin in a regulatory measure which requires network operators to collect it, it cannot be asserted that it is the result of a mere practice.

145 In that regard, it is irrelevant that the regulatory measure provides only for an obligation on the part of the network operators to collect the surcharge at issue without expressly identifying an obligation on the part of the network users to pay that surcharge. The effectiveness of the legal obligation to collect that surcharge necessarily implies a symmetrical obligation to pay that charge on the part of the persons liable for such payment.

146 It also follows from the foregoing that the fact that a surcharge such as the one at issue is levied at an 'intermediate level', without any obligation on electricity suppliers to pass it on to their end customers, is not a decisive factor for classifying that surcharge as a charge or compulsory surcharge, within the meaning of the case-law referred to in paragraph 105 of the present judgment.

147 Moreover, in so far as the Infineon companies argue that there was no obligation to collect the surcharge at issue before 2012, it suffices to note that, as is apparent from paragraph 24 of the present judgment, the decision at issue concerns only the period from 1 January 2012 to 31 December 2013.

148 In the third place, as regards the compensation of the costs generated by the exemption at issue, the General Court, referring to the 2011 BNetzA decision, endorsed, in paragraphs 91, 92 and 95 of the judgment under appeal, the Commission's finding in the decision at issue that the mechanism of the surcharge at issue fully compensated network operators for their losses in revenue stemming from the exemption at issue, since the amount of that surcharge was adjusted to meet the financial needs triggered by that exemption.

149 The finding that the methodology for calculating the amount of the surcharge at issue provided for in the 2011 BNetzA decision was intended to enable all the costs associated with the exemption at issue to be covered constitutes a factual appraisal by the General Court which it is not for the Court of Justice to review at the appeal stage in the absence of any allegation of distortion, in accordance with the case-law referred to in paragraph 141 of the present judgment.

150 Moreover, as regards losses in revenue due to insolvency, the financial effects of which are borne by the distribution system operators, the General Court held, in paragraph 95 of the judgment under appeal, that such a loss does not constitute a loss of revenue for the purposes of the scheme in question and is justified by the fact that the relationships between the network operators and the persons ultimately liable for payment of the surcharge at issue are relationships governed by private law.

151 It is apparent from the case-law of the Court that funds financed through compulsory charges imposed by State legislation, and managed and apportioned in accordance with that legislation, may be regarded as 'State resources' within the meaning of Article 107(1) TFEU even if they are managed by entities separate from the public authorities (judgments of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 25, and of 15 May 2019, *Achema and Others*, C-706/17, EU:C:2019:407, paragraph 54).

152 Therefore, and in so far as such entities, like the network operators, are subject to an obligation to collect the surcharges in question, the fact that the relationships between those operators and the persons ultimately liable for payment of the surcharge at issue are relationships governed by private law does not preclude the funds financed through that surcharge from being regarded as State resources. The same applies to the fact that, in the event of insolvency, losses in revenue – including unpaid amounts of the surcharge at issue – are borne by those operators. In any event, the Infineon companies have not put forward any argument seeking specifically to demonstrate that the General Court's finding that such losses do not constitute a loss of revenue for the purposes of the scheme in question is vitiated by an error of law.

153 In the fourth place, as regards the arguments raised by the Infineon companies alleging that there is no penalty or public guarantee in the event of non-payment of the surcharge at issue and that the State does not have any direct power of disposal over amounts collected, it suffices to observe that, in the light of the case-law referred to in paragraph 106 of the present judgment, those factors are not strictly necessary for a finding that there exists a charge or other compulsory surcharges involving the use of State resources, within the meaning of the case-law cited in paragraph 105 of the present judgment.

154 In the light of the foregoing, the second part of the single ground of appeal put forward by the Federal Republic of Germany, supported by the Infineon companies, must be rejected as unfounded. The fourth complaint of the first ground of appeal put forward by the Infineon companies is ineffective, with the result that that ground of appeal must be rejected in its entirety.

State control

– *Arguments of the parties*

155 By the third part of its single ground of appeal, the Federal Republic of Germany claims, in essence, that the General Court erred in law in holding that there is State control over the funds arising from the surcharge at issue.

156 The Commission contends that that third part is unfounded and, in any event, ineffective.

– *Findings of the Court*

157 As is apparent from the case-law cited in paragraphs 104 to 108 of the present judgment, the existence of a charge or other compulsory surcharges under national legislation and managed and apportioned in accordance with that legislation and the existence of State control over the sums in question constitute two alternative criteria for identifying 'State resources' within the meaning of Article 107(1) TFEU.

158 In the present case, the General Court found, in paragraph 97 of the judgment under appeal, that the surcharge at issue constituted a parafiscal charge or a compulsory charge involving the use of 'State resources' within the meaning of that case-law. As is apparent from paragraphs 127 to 154 of the present judgment, the Federal Republic of Germany has not succeeded in demonstrating that that finding of the General Court is vitiated by an error of law.

159 That finding is, in itself, sufficient for it to be held that the measure at issue was granted through 'State resources' within the meaning of Article 107(1) TFEU, without there being any need to examine whether the sums in question were under State control.

160 Accordingly, the third part of the Federal Republic of Germany's single ground of appeal is ineffective.

161 It follows from all of the foregoing that the single ground put forward in support of the appeal in Case C-794/21 P must be rejected in its entirety as, in part, ineffective and, in part, unfounded.

Second ground of appeal in Case C-800/21 P

Arguments of the parties

162 The Infineon companies submit that the General Court distorted the facts and national law on several occasions.

163 First, they maintain that, contrary to what is stated in paragraphs 12, 66, 93 and 99 of the judgment under appeal, the BNetzA did not fix the amount of the surcharge at issue. Rather, that surcharge is determined by the network operators, as is apparent from recitals 61, 75 and 123 of the decision at issue.

164 Second, they submit that, contrary to what the General Court found in paragraph 92 of the judgment under appeal, the BNetzA did not impose on the transmission system operators a very detailed methodology for calculating that surcharge. The 2011 BNetzA decision contains, in that regard, only very general requirements, as is apparent from recitals 61, 75 and 123 of the decision at issue.

165 Third, they maintain that, contrary to the findings made in paragraphs 93, 99 and 106 et seq. of the judgment under appeal, the network operators' losses in revenue resulting from the exemptions from network charges are not entirely financed by means of the surcharge at issue. They claim that, in this respect, the General Court disregarded the fact that the 2011 BNetzA decision deals only with recovery measures in respect of insolvent network users which do not satisfy the conditions for exemption from network charges. By contrast, network operators bear the consequences of non-payment of the surcharge at issue by network users.

166 Fourth, they submit that, contrary to what the General Court stated in paragraph 85 of the judgment under appeal, the network operators are not obliged under national law to collect the surcharge at issue. They argue that the 2011 BNetzA decision was declared null and void and could not produce legal effects. Moreover, under national law, that decision cannot have any effect on network users.

167 The Commission contends that that ground of appeal must be rejected as manifestly unfounded.

Findings of the Court

168 As has been recalled in paragraph 141 of the present judgment, an appeal is to be limited to points of law only. Since the General Court has exclusive jurisdiction to find and appraise the relevant facts and assess the evidence, the appraisal of those facts and the assessment of that evidence do not, save where the facts and evidence are distorted, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal.

169 Accordingly, with respect to the assessment, in the context of an appeal, of the General Court's findings on national law, which, in the field of State aid, constitute findings of fact, the Court of Justice has jurisdiction only to determine whether there was a distortion of that law (judgments of 3 April 2014, *France* v *Commission*, C-559/12 P, EU:C:2014:217, paragraph 79, and of 14 December 2023, *Commission* v *Amazon.com and Others*, C-457/21 P, EU:C:2023:985, paragraph 20 and the case-law cited). A distortion must be obvious from the documents in the

Court's file, without there being any need to carry out a new assessment of the facts and the evidence (judgment of 3 April 2014, *France* v *Commission*, C-559/12 P, EU:C:2014:217, paragraph 80).

170 Furthermore, where an appellant alleges distortion of the facts or evidence by the General Court, he or she must, pursuant to Article 256 TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union and Article 168(1)(d) of the Rules of Procedure of the Court of Justice, indicate precisely the evidence alleged to have been distorted and show the errors of appraisal which, in his or her view, led to such distortion (judgments of 30 November 2016, *Commission* v *France and Orange*, C-486/15 P, EU:C:2016:912, paragraph 99, and of 28 April 2022, *Yieh United Steel* v *Commission*, C-79/20 P, EU:C:2022:305, paragraph 53).

171 In the present case, it must be observed that, although, by their second ground of appeal, the Infineon companies allege a number of distortions of elements of national law and of facts by the General Court, they do no more than set out the assertions referred to in paragraphs 163 to 166 of the present judgment. Without the slightest explanation or demonstration, they thus allege contradictions between the General Court's statements and those contained in the decision at issue or the content of the 2011 BNetzA decision. Such vague assertions cannot suffice to establish that there has been distortion.

172 It follows that the second ground put forward in support of the appeal in Case C-800/21 P must be rejected as manifestly unfounded.

173 Consequently, since all the grounds of appeal put forward in support of the main appeals in Cases C-794/21 P and C-800/21 P have been rejected, those appeals must be dismissed in their entirety.

Costs

174 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to the costs. Article 138(1) and (2) of those rules, applicable to appeal proceedings by virtue of Article 184(1) thereof, provides that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings and that, where there is more than one unsuccessful party, the Court is to decide how the costs are to be shared.

175 In the present case, the Federal Republic of Germany and the Infineon companies have been unsuccessful in all of their claims concerning, respectively, the main appeal in Case C-794/21 P and the main appeal in Case C-800/21 P, while the Commission has been unsuccessful in all of its claims concerning the cross-appeals in those cases.

176 In view of those factors, on a fair assessment of the circumstances of the present case, each party should be ordered to bear its own costs.

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

1. **Dismisses the main appeals and the cross-appeals;**

2. **Orders the Federal Republic of Germany, Infineon Technologies Dresden GmbH & Co. KG, Infineon Technologies AG and the European Commission to bear their own costs.**

[Signatures]