Reports of Cases

JUDGMENT OF THE GENERAL COURT (Ninth Chamber)

4 February 2016 *

(State aid — German tax legislation concerning loss carry-forward to future tax years (Sanierungsklausel) — Decision declaring the aid incompatible with the internal market — Action for annulment — Individual concern — Admissibility — Concept of State aid — Selectivity — Nature and general scheme of the tax system — State resources — Obligation to state reasons — Legitimate expectations)

In Case T-620/11,

GFKL Financial Services AG, established in Essen (Germany), represented initially by M. Schweda, S. Schultes-Schnitzlein, J. Eggers and M. Knebelsberger, and subsequently by M. Schweda, J. Eggers, M. Knebelsberger and F. Loose, lawyers,

applicant,

supported by

Federal Republic of Germany, represented by T. Henze and K. Petersen, acting as Agents,

intervener,

v

European Commission, represented initially by T. Maxian Rusche, M. Adam and R. Lyal, and subsequently by T. Maxian Rusche, R. Lyal and M. Noll-Ehlers, acting as Agents,

defendant,

APPLICATION for annulment of Commission Decision 2011/527/EU of 26 January 2011 on State aid C 7/10 (ex CP 250/09 and NN 5/10) implemented by Germany — Scheme for the carry-forward of tax losses in the case of restructuring of companies in difficulty (Sanierungsklausel) (OJ 2011 L 235, p. 26),

THE GENERAL COURT (Ninth Chamber),

composed of G. Berardis, President, O. Czúcz and A. Popescu (Rapporteur), Judges,

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing on 9 July 2015,

gives the following

* Language of the case: German.

Judgment

National legal framework

The rule governing loss carry-forward

1 In Germany, pursuant to Paragraph 10d(2) of the Einkommensteuergesetz (Law on income tax), losses made in the course of a tax year may be carried forward to later tax years, which means that the losses in question may be subtracted from the taxable income of the following years ('the loss carry-forward rule').

2 Pursuant to Paragraph 8(1) of the Körperschaftsteuergesetz (Law on corporation tax; 'the KStG'), the loss carry-forward rule applies also to undertakings subject to corporation tax.

The rule governing the forfeiture of losses

3 The possibility of carrying losses forward led to the acquisition, for the sole purpose of reducing tax liabilities, of 'empty-shell companies', that is to say, companies which had long ceased any economic activity but which still retained losses that had been carried forward ('Mantelkauf' transactions).

4 In order to counteract the acquisition of empty-shell companies, the German legislature introduced in 1997 Paragraph 8(4) of the KStG ('the former rule governing the forfeiture of losses'). That rule restricted the carrying-forward of losses to those corporate entities that were legally and economically identical to the entity that had incurred losses. Under that provision, corporate entities were not considered to be identical if more than half of the shares in a corporate entity had been transferred and the corporate entity then continued its economic activity or started it again with predominantly new assets.

5 The former rule governing the forfeiture of losses nonetheless provided for an exception, set out in the third sentence of Paragraph 8(4) of the KStG, pursuant to which corporate entities were considered to be economically identical, with the result that the losses were not forfeited in the event that the corporate entity being acquired was 'restructured'. This might occur in two cases: first, where the injection of new assets was solely for the purpose of restructuring the loss-making entity and if the activity which gave rise to the unrelieved loss carry-forward continued on a comparable scale for five years; secondly, where, rather than injecting new assets, the acquiring entity covered the losses that had accrued at the loss-making entity.

6 In 2008, the Unternehmensteuerreformgesetz (Law on Business Taxation Reform) repealed the former rule governing the forfeiture of losses and inserted a new Paragraph 8c(1) into the KStG ('the rule governing the forfeiture of losses'). That provision restricts the possibility of carrying losses forward in the event that 25% or more of the shares in a company are acquired ('the prejudicial acquisition of a shareholding'). More specifically, the new provision provides, first, that if, within a period of five years, between 25% and 50% of the share capital, membership rights, ownership rights or voting rights are transferred, unused losses are forfeited on a pro rata basis and, secondly, that unused losses are forfeited if more than 50% of the share capital, membership rights, ownership rights or voting rights are transferred to an acquirer.

7 Initially, the new rule governing the forfeiture of losses did not provide for any exceptions. However, the tax authorities could, in the case of the prejudicial acquisition of a shareholding relating to the restructuring of an undertaking in difficulty, grant tax exemptions based on considerations of equity, pursuant to the decree on restructuring of 27 March 2003 issued by the German Federal Ministry of Finance ('the decree on restructuring').

The restructuring clause

8 In September 2007, the German Government submitted to the Bundestag (lower house of the Federal Parliament) a draft law, referred to as the 'MoRaKG Law', relating to the modernisation of the general conditions for capital investments, which provided inter alia for a derogation from the rule governing the forfeiture of losses.

9 Following the notification of the draft law at issue in accordance with Article 108(3) TFEU, the European Commission, by Decision 2010/13/EC of 30 September 2009 on aid scheme No C 2/09 (ex N 221/08 and N 413/08) which Germany intends to grant to modernise the general conditions for capital investments (OJ 2010 L 6, p. 32; 'the decision relating to the MoRaKG Law'), prohibited the derogation contemplated by classifying it as State aid incompatible with the internal market.

10 In June 2009, the Bürgerentlastungsgesetz Krankenversicherung (Law on Citizens' Relief — Health Insurance Fund) introduced Paragraph 8c(1a) of the KStG ('the restructuring clause' or 'the measure at issue'), under which the carry-forward of losses continues to be possible where a company in difficulty is acquired for the purpose of restructuring. Pursuant to that clause, a corporate entity may carry losses forward also in the case of the prejudicial acquisition of a shareholding, provided that the following conditions are met:

(a) the acquisition serves the purpose of restructuring the corporate entity;

(b) the company is, or is likely to be, insolvent or over-indebted at the time of the acquisition;

(c) the company's fundamental business structures are preserved, which requires:

— the corporate entity to honour an agreement between management and works council on the preservation of jobs,

— preservation of 80% of the jobs (in terms of the average annual wage bill) for the first five years following the acquisition, or

— injections of significant business assets or write-off of debts which still have an economic value within 12 months of the acquisition; business assets are significant if they represent at least 25% of the assets of the previous financial year; any transfer back to the acquiring entity within the first three years is deducted from the value of the new operating capital;

(d) the company does not change its sector of activity during the five years following the acquisition;

(e) the company had not ceased operation at the time of the acquisition.

11 The restructuring clause entered into force on 10 July 2009, and applies retroactively from 1 January 2008, which is the same date as that on which the rule governing the forfeiture of losses entered into force.

Clauses governing hidden reserves and groups of undertakings

12 In December 2009, the Wachstumsbeschleunigungsgesetz (Law on Economic Growth Acceleration) introduced, with effect from 1 January 2010, two new exceptions to the rule governing the forfeiture of losses, namely, first, the fifth sentence of Paragraph 8c(1) of the KStG ('the clause governing groups of undertakings') and, secondly, the sixth sentence of Paragraph 8c(1) of the KStG ('the clause governing hidden reserves').

13 The clause governing groups of undertakings provides that the carry-forward of losses is to be maintained for all restructurings carried out exclusively within a group of undertakings at the head of which is a single individual or company holding 100% of the shares.

14 The clause governing hidden reserves provides that the carry-forward of losses is to be maintained in so far as, at the time of the prejudicial acquisition of a shareholding, those losses correspond to hidden reserves of the company's assets; 'hidden reserves' are the amount constituted by the difference between, on the one hand, own capital which is to be inferred, overall, from the calculation for tax purposes of profits and, on the other, the value of the shares in the undertaking corresponding to that own capital.

Facts

15 The applicant, GFKL Financial Services AG, is a financial services company that, in 2009, was at risk of insolvency and required restructuring.

16 On 14 December 2009, an investor bought nearly 80% of the shares in the applicant, and on 4 December 2010 the new majority shareholder proceeded to inject over EUR 50 million into it by way of an increase in capital, which enabled the applicant to avoid insolvency.

17 On the date of the sale of the shares, the applicant fulfilled the conditions entitling it to avail itself of the restructuring clause, as is clear from the binding information from the Finanzamt Essen-NordOst (Essen-NorthEast tax office) of 3 September 2009 ('the binding information').

18 Following the Commission's decision to open the formal investigation procedure (see paragraph 21 below), the German Ministry of Finance, by letter of 30 April 2010, ordered the tax authorities to cease applying the restructuring clause.

19 The tax authorities accordingly annulled the binding information, and sent the applicant a tax assessment for the corporation tax payable in relation to the 2009 tax year which did not apply the restructuring clause.

20 On 22 July 2011, the Federal Republic of Germany sent the Commission, as required by the contested decision (see paragraph 31 below), the list of companies which had benefited from the measure at issue. The applicant's name was included in the list of companies for which binding information concerning application of the restructuring clause had been annulled.

Administrative procedure

21 By letters of 5 August and 30 September 2009, the Commission requested the Federal Republic of Germany to provide it with information on Paragraph 8c of the KStG. The German authorities replied to that request by letters of 20 August and 5 November 2009. By decision of 24 February 2010 (OJ 2010 C 90, p. 8; 'the opening decision'), the Commission opened the formal investigation procedure provided for under Article 108(2) TFEU concerning State aid in Case C 7/10 (ex NN 5/10).

22 Following the publication of the opening decision in the *Official Journal of the European Union* on 8 April 2010, the interested parties were invited to submit their comments. The German authorities submitted their reply by letter of 9 April 2010.

23 On 9 April and 3 June 2010, two meetings took place between the Commission staff and representatives of the Federal Republic of Germany. The latter submitted further information on 2 July 2010. The Commission did not receive any comments from interested third parties.

Contested decision

24 On 26 January 2011, the Commission adopted Decision 2011/527/EU on State aid C 7/10 (ex CP 250/09 and NN 5/10) implemented by Germany — Scheme for the carry-forward of tax losses in the case of restructuring of companies in difficulty (Sanierungsklausel) (OJ 2011 L 235, p. 26; 'the contested decision').

25 In the first place, the Commission classified the restructuring clause as State aid.

26 First, the Commission noted that the possibility granted by the German Government to certain companies of reducing their corporate tax burden through loss carry-forward resulted in a loss of public revenue, and was therefore granted from State resources. It further stated that the aid was granted on the basis of legislation and that it was therefore attributable to the State.

27 Secondly, the Commission considered that the restructuring clause created an exception to the general rule providing for the forfeiture of losses which were not used by companies whose ownership of which had changed. That clause was therefore liable to confer a selective advantage on companies that met the requirements for benefitting from it, which was not justified by the nature or general scheme of the system. According to the Commission, the purpose of the restructuring clause was to tackle the problems caused by the economic and financial crisis, an objective which was extrinsic to the tax system.

28 Thirdly, the Commission found that the restructuring clause applied to all sectors of the German economy, nearly all of which were active on markets open to competition and intra-Union trade. Consequently, the measure was liable to affect intra-Union trade and to distort or threaten to distort competition. Moreover, since all potential beneficiaries of the measure were undertakings in difficulty within the meaning of the Community Guidelines on State aid for Rescuing and Restructuring Firms in Difficulty (OJ 2004 C 244, p. 2), none of them was covered within the meaning of Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 [EC] and 88 [EC] to *de minimis* aid (OJ 2006 L 379, p. 5).

29 In the second place, the Commission examined whether the measure could be considered compatible with the internal market and concluded that limited aid to certain beneficiaries could be declared compatible with the internal market, provided that it met all the conditions of a German aid scheme which the Commission had approved within the meaning of the temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis (OJ 2009 C 83, p. 1). By contrast, the Commission found the restructuring clause to be incompatible with the internal market on the basis of the guidelines on State Aid for rescuing and restructuring firms in difficulty, the guidelines on national regional aid for 2007-2013 (OJ 2006 C 54, p. 13), and the guidelines on State aid for environmental protection (OJ 2008 C 82, p. 1), as well as with Article 107(3) TFEU.

30 In the third place, the Commission instructed the Federal Republic of Germany to take all necessary measures to recover the aid that had been unlawfully granted to the beneficiaries. The Federal Republic of Germany was also required to draw up a list of undertakings which had benefited from the aid since 1 January 2008. The Commission also stated that the annual date for the payment of corporation tax was to be regarded as the relevant date for determining when the aid was made available to the beneficiaries and that the amount of aid to be recovered was to be calculated on the basis of the tax declarations of the companies concerned. The amount of the aid corresponded, according to the Commission, to the difference between the amount of tax which should have been paid if the restructuring clause had not been applied and the amount that was in fact paid pursuant to the application of that clause.

31 The operative part of the contested decision is worded as follows:

‘Article 1

The State aid granted on the basis of [Paragraph] 8c(1a) of the [KStG], unlawfully put into effect by Germany in breach of Article 108(3) TFEU, is incompatible with the internal market.

Article 2

Individual aid granted under the scheme referred to in Article 1 is compatible with the internal market under Article 107(3)(b) [TFEU], as interpreted by the Temporary Framework, provided that the aid amount does not exceed EUR 500 000, the beneficiary was not an undertaking in difficulty on 1 July 2008 and all the other conditions set out in section 4.2.2 of the Temporary Framework are met.

Article 3

Individual aid granted under the scheme referred to in Article 1 which, at the time it is granted, fulfils the conditions laid down by any aid scheme approved by the Commission on a legal basis other than [Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Article 87 [EC] and 88 [EC] (General Block Exemption Regulation) (OJ 2008 L 214, p. 3)], the Regional Aid Guidelines, the Research, Development and Innovation Guidelines [(OJ 2006 C 323, p. 1)], and which does not exclude undertakings in difficulty as potential beneficiaries, is compatible with the internal market, up to the maximum aid intensities applicable to that type of aid.

Article 4

1. Germany shall withdraw the scheme referred to in Article 1.

2. Germany shall recover the incompatible aid granted under the scheme referred to in Article 1 from the beneficiaries.

…

Article 6

1. Within two months following notification of this Decision, Germany shall submit the following information to the Commission:

(a) The list of beneficiaries that have received aid under the scheme referred to in Article 1 and the total amount of aid received by each of them under the scheme;

…’

Procedure and forms of order sought

32 By application lodged at the Court Registry on 2 December 2011, the applicant brought the present action.

33 By a separate document lodged at the Court Registry on 16 March 2012, the Commission raised an objection of inadmissibility under Article 114 of the Rules of Procedure of the General Court of 2 May 1991. The applicant lodged its observations on that objection on 2 May 2012.

34 By document lodged at the Court Registry on 29 February 2012, the Federal Republic of Germany applied for leave to intervene in the present proceedings in support of the form of order sought by the applicant. By order of 2 May 2012, the President of the Eighth Chamber of the Court granted that leave. The Federal Republic of Germany lodged its statement in intervention, limited to admissibility, and the other parties lodged their observations on that statement within the prescribed periods.

35 Following a change in the composition of the Chambers of the Court, the Judge-Rapporteur was assigned to the Ninth Chamber, to which the present case was, accordingly, allocated.

36 By order of the Court (Ninth Chamber) of 17 July 2014, consideration of the objection of inadmissibility was reserved for the final judgment, in accordance with Article 114(4) of the Rules of Procedure of 2 May 1991.

37 On 2 September 2014, the Commission filed its defence. The reply and rejoinder were respectively lodged on 27 October 2014 by the applicant and on 16 January 2015 by the Commission.

38 On 27 October 2014, the Federal Republic of Germany lodged its statement in intervention and the other parties lodged their observations on that statement within the prescribed periods.

39 By way of measures of organisation of procedure, provided for under Article 64 of the Rules of Procedure of 2 May 1991, the Court (Ninth Chamber), on 19 May 2015, put written questions to the parties, to which the latter replied within the prescribed period.

40 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 9 July 2015.

41 The applicant, supported by the Federal Republic of Germany, claims that the Court should:

— reject the objection of inadmissibility raised by the Commission;

— annul the contested decision;

— order the Commission to pay the costs.

42 The Commission contends that the Court should:

— dismiss the action as inadmissible or, in the alternative, as unfounded;

— order the applicant to pay the costs.

Law

Admissibility of the action

43 In support of its objection of inadmissibility, the Commission argues that the present action is inadmissible on the ground that the applicant has not shown either that the conditions of the fourth paragraph of Article 263 TFEU were met or that it had an interest in bringing proceedings.

Locus standi within the meaning of the fourth paragraph of Article 263 TFEU

44 First, the Commission denies that the applicant has *locus standi* inasmuch as the contested decision is not of individual concern to it.

45 The Commission submits that the applicant is not an actual recipient of individual aid granted pursuant to the restructuring clause and in respect of which the Commission has ordered recovery. The tax debt is established in a legally binding manner only when it has been determined by way of a tax assessment, pursuant to Paragraph 155(1) of the German tax code.

46 In the present case, the mere change of share ownership, which is the transaction that triggers the application of the restructuring clause, did not entail the legally binding grant of the aid, with the result that, at the time of the acquisition of the shareholding, it had not yet been established whether and when the applicant would once again post a profit in order for the loss carry-forward actually to open the way to a tax reduction. Nor, the Commission submits, may the applicant rely on the binding information as a basis for its individual concern. That information does not, of itself, give rise to a tax advantage and lost its compulsory effect before a tax assessment which took account of the restructuring clause was established.

47 In those circumstances, according to the Commission, the contested decision does not order the refund of aid already granted to the applicant, but leaves it to the national authorities to draw the appropriate conclusions from the incompatibility of the aid scheme with the internal market by way of tax assessments.

48 Secondly, the Commission notes that the action is also inadmissible in respect of the third situation referred to in the fourth paragraph of Article 263 TFEU, since the contested decision entails implementing measures, namely the establishment of a tax assessment.

49 The applicant, supported by the Federal Republic of Germany, submits that the action is admissible.

50 Under the fourth paragraph of Article 263 TFEU, '[a]ny natural or legal person may … institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and which does not entail implementing measures'.

51 It should be noted, as a preliminary point, that the contested decision was not addressed to the applicant, but solely to the Federal Republic of Germany.

52 It should also be noted that, inasmuch as Article 4 of the contested decision requires the Federal Republic of Germany to withdraw and recover from the beneficiaries the aid referred to in Article 1 of that decision, the applicant must be held to be directly concerned by that decision. The two criteria pertaining to direct concern which emerge from the case-law — first, the fact that the measure at issue must directly produce effects on the applicant's legal situation and, secondly, the fact that the measure must not leave any discretion to the addressees of the measure required to implement it — are satisfied in the present case (see, to that effect, judgment of 17 September 2009 in *Commission* v *Koninklijke FrieslandCampina*, C-519/07 P, ECR, EU:C:2009:556, paragraph 48 and the case-law cited). Moreover, the Commission raises no objection in that respect.

53 Since the applicant's direct concern is established, it is appropriate to check whether the applicant is also individually concerned by the contested decision, without it being necessary, if so, to check whether the contested decision is a regulatory act that does not entail implementing measures.

54 According to settled case-law, persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of certain attributes which are specific to them or by reason of circumstances in which they are differentiated from all other persons and, by virtue of those factors, distinguishes them individually just as in the case of the person addressed (judgments of 15 July 1963 in *Plaumann* v *Commission*, 25/62, ECR, EU:C:1963:17, at

p. 107; of 9 June 2011 in *Comitato 'Venezia vuole vivere' and Others* v *Commission*, C-71/09 P, C-73/09 P and C-76/09 P, ECR, EU:C:2011:368, paragraph 52; and of 19 December 2013 in *Telefónica* v *Commission*, C-274/12 P, ECR, EU:C:2013:852, paragraph 46).

55 Consequently, an undertaking may not, in principle, bring an action for annulment of a Commission decision prohibiting a sectoral aid scheme if it is concerned by that decision solely by virtue of belonging to the sector in question and being a potential beneficiary of the scheme. Such a decision is, vis-à-vis such an undertaking, a measure of general application covering situations which are determined objectively and entails legal effects for a class of persons envisaged in a general and abstract manner (see judgments of 29 April 2004 in *Italy* v *Commission*, C-298/00 P, ECR, EU:C:2004:240, paragraph 37 and the case-law cited, and of 11 June 2009 in *Acegas* v *Commission*, T-309/02, ECR, EU:T:2009:192, paragraph 47 and the case-law cited). In that regard, the possibility of determining more or less precisely the number, or even the identity, of the persons to whom a measure applies by no means implies that it must be regarded as being of individual concern to them as long as that measure is applied by virtue of an objective legal or factual situation defined by it (judgment in *Telefónica* v *Commission*, paragraph 54 above, EU:C:2013:852, paragraph 47).

56 By contrast, where a decision affects a group of persons who were identified or identifiable when that measure was adopted by reason of criteria specific to the members of that group, those persons might be individually concerned by that measure inasmuch as they form part of a limited class of traders (judgments of 17 January 1985 in *Piraiki-Patraiki and Others* v *Commission*, 11/82, ECR, EU:C:1985:18, paragraph 31; of 22 June 2006 in *Belgium and Forum 187* v *Commission*, C-182/03 and C-217/03, ECR, EU:C:2006:416, paragraph 60; and in *Commission* v *Koninklijke FrieslandCampina*, paragraph 52 above, EU:C:2009:556, paragraphs 54 to 57).

57 It is in the light of that case-law that it is necessary to determine whether, given its legal and factual situation, the applicant must be regarded as being individually concerned by the contested decision.

58 As a preliminary point, contrary to the applicant's arguments, it must be held that the characterisation as a 'concerned' person within the meaning of Article 108(2) TFEU does not entitle the applicant to avail of a specific status capable of establishing its individual concern, especially as it did not make use of the procedural rights flowing therefrom, in particular that of submitting its observations during the formal investigation procedure (see, to that effect, judgment of 13 December 2005 in *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, C-78/03 P, ECR, EU:C:2005:761, paragraph 37).

59 As regards individual concern within the meaning of the judgment in *Plaumann* v *Commission*, paragraph 54 above, (EU:C:1963:17), it should be noted that the applicant's factual and legal situation is characterised by the following elements.

60 First, when the 2009 tax year ended and therefore before the opening of the proceedings brought by the Commission, the applicant had a right to carry its losses forward under the German legislation, as a result of the fact that the conditions stipulated by the restructuring clause were satisfied. In addition, the applicant had carried its existing losses forward to 31 December 2009 in its accounts as deferred tax assets.

61 Secondly, in the course of 2009, the applicant made taxable profits from which it claims to have deducted the losses carried forward under the restructuring clause.

62 Those circumstances had been certified by the German tax authorities in the binding information, which took account of the losses carried forward under the restructuring clause (see paragraph 17 above). Moreover, the receipt of that binding information entailed, subsequently, the inclusion of the applicant's name on the list sent by the German authorities to the Commission pursuant to Article 6(1)(a) of the contested decision.

63 Accordingly, pursuant to the German legislation, it was certain that, at the close of the 2009 tax year, the applicant would have made a tax saving, which it was, moreover, able to quantify precisely. Since the German authorities had no discretion with regard to the application of the measure at issue, the realisation of that tax saving, by way of a reduced payment of tax, was only a matter of time, under the detailed rules for the implementation of the tax system. The applicant thus had an acquired right, certified by the German authorities before the adoption of the opening decision and, subsequently, of the contested decision, to the application of that tax saving, which, had it not been for those decisions, would have crystallised as a result of the issue of a tax assessment authorising the loss carry-forward and the consequent posting thereof to the applicant's balance sheet. The applicant was, therefore, easily identifiable by the German tax authorities and the Commission.

64 Consequently, the applicant may not be regarded solely as an undertaking concerned by the contested decision because it belongs to the sector in question and because of its status as a potential beneficiary, but must rather be seen as being part of a closed category of traders, who were identified or at least readily identifiable at the time of the adoption of the contested decision, within the meaning of the judgment in *Plaumann* v *Commission*, paragraph 54 above (EU:C:1963:17) (see also, by analogy, judgments in *Belgium and Forum 187* v *Commission*, paragraph 56 above, EU:C:2006:416, paragraph 63; *Commission* v *Koninklijke FrieslandCampina*, paragraph 52 above, EU:C:2009:556, paragraph 57; *Comitato 'Venezia vuole vivere' and Others* v *Commission*, paragraph 54 above, EU:C:2011:368, paragraph 56; of 27 February 2014 in *Stichting Woonpunt and Others* v *Commission*, C-132/12 P, ECR, EU:C:2014:100, paragraphs 59 to 61; and *Stichting Woonlinie and Others* v *Commission*, C-133/12 P, ECR, EU:C:2014:105, paragraphs 46 to 48).

65 That conclusion is not called into question by the fact that, following the opening decision and, subsequently, the contested decision, the German authorities adopted measures designed to ensure that the restructuring clause was not used, including, inter alia, the annulment of the binding information and the adoption of a tax assessment relating to corporation tax for the 2009 tax year which no longer took account of the losses carried forward under the restructuring clause (see paragraph 19 above).

66 The German authorities decided to suspend the application of the restructuring clause, without, however, repealing it, and to issue a tax assessment without applying that clause, specifically in order to comply with the opening decision and the contested decision. Accordingly, in the context of the examination of the admissibility of the action challenging the contested decision, by which the Commission concluded that the measure at issue constituted State aid and found it to be incompatible with the internal market, the Commission may not take advantage of the fact that the German authorities immediately took all necessary measures in order to ensure compliance with that decision, pending the outcome of a possible appeal against it.

67 Nor may that conclusion be called into question by the case-law relied on by the Commission in its pleadings and at the hearing, and in particular by the judgments in *Telefónica* v *Commission*, paragraph 54 above (EU:C:2013:852); of 11 June 2009 in *AMGA* v *Commission* (T-300/02, ECR, EU:T:2009:190); *Acegas* v *Commission*, paragraph 55 above (EU:T:2009:192); and of 8 March 2012 in *Iberdrola* v *Commission* (T-221/10, ECR, EU:T:2012:112).

68 The factual circumstances in those cases are not comparable to those at issue in the present case, in which it was found that, because of the particularities of the German tax legislation, the applicant had an acquired right to a tax saving, certified by the German tax authorities (see paragraph 63 above), that circumstance setting it apart from other operators which are concerned only as potential beneficiaries of the measure at issue (see, to that effect, judgment in *Commission* v *Koninklijke FrieslandCampina*, paragraph 52 above, EU:C:2009:556, paragraph 55).

69 Nor is the conclusion in paragraph 64 above called into question by the Commission's argument that only an advantage granted by way of State resources could support the applicant's individual concern and that there was a financial burden for the State only at the time at which the tax reduction was established by the tax assessment.

70 It should be recalled that the elements which the case-law takes into account with respect to individual concern within the meaning of the fourth paragraph of Article 263 TFEU (see paragraphs 54 to 56 above) do not necessarily coincide with the elements constitutive of State aid within the meaning of Article 107(1) TFEU (see, by analogy, judgment in *Comitato 'Venezia vuole vivere' and Others* v *Commission*, paragraph 54 above, EU:C:2011:368, paragraphs 56, 63 and 64). Within the meaning of the judgment in *Plaumann* v *Commission*, paragraph 54 above (EU:C:1963:17, at p. 107), a person other than that to whom a decision is addressed will be individually concerned by that decision if it affects that person as a result of certain specific attributes or of a factual situation which sets it apart from any other person, and if it is therefore part of a limited class of traders.

71 In the present case, it should be recalled that, under the national legislation, the applicant had, before the adoption of the opening decision and, subsequently, of the contested decision, an acquired right, certified by the German tax authorities, to make a tax saving in the 2009 tax year. Moreover, the Commission itself stated, in recital 50 of the contested decision, that the mere possibility granted by the German Government to certain companies of reducing their tax burden by a loss carry-forward resulted in a loss of public revenue and constituted State aid.

72 In light of all of the foregoing, it must be held that, in the circumstances of the present case, the applicant is directly and individually concerned by the contested decision.

73 The applicant therefore has *locus standi* within the meaning of the fourth paragraph of Article 263 TFEU.

The interest in bringing proceedings

74 The Commission argues that the applicant is not the recipient of aid and cannot therefore derive any benefit from a possible annulment of the contested decision by the Court. The Federal Republic of Germany, it submits, is not required, following the adoption of the contested decision, to recover the aid from the applicant, and, irrespective of whether or not the contested decision is annulled, the German authorities may decide at any time to repeal in full the measure in question.

75 The applicant, supported by the Federal Republic of Germany, disputes those arguments.

76 In accordance with settled case-law, an action for annulment brought by a natural or legal person is admissible only in so far as that person has an interest in the annulment of the contested measure. Such an interest requires that the annulment of that act must be capable, in itself, of having legal consequences and that the action may therefore, through its outcome, procure an advantage to the party which brought it (judgments in *Commission* v *Koninklijke FrieslandCampina*, paragraph 52 above, EU:C:2009:556, paragraph 63; *Stichting Woonpunt and Others* v *Commission*, paragraph 64 above, EU:C:2014:100, paragraphs 50 to 54; and *Stichting Woonlinie and Others* v *Commission*, paragraph 64 above, EU:C:2014:105, paragraph 54).

77 The conditions governing the admissibility of an action must be judged, subject to the separate question of the loss of an interest in bringing proceedings, at the time when the application is lodged (see judgment of 21 March 2002 in *Shaw and Falla* v *Commission*, T-131/99, ECR, EU:T:2002:83, paragraph 29 and the case-law cited).

78 In the present case, the applicant satisfied the conditions for application of the restructuring clause and had acquired a benefit from that clause, as is apparent from paragraphs 59 to 61 above.

79 Although the application of the restructuring clause was suspended following the adoption of the contested decision, under Paragraph 34(6) of the KStG, in the event of the annulment of that decision, the restructuring clause would again apply, retroactively, to all undertakings whose tax assessment has not yet become final, including the applicant, with the result that the annulment of the contested decision would be beneficial to the applicant because it would become entitled to ask for the restructuring clause to be applied, at least with regard to the taxation of revenue for 2009.

80 Consequently, the applicant has an interest in bringing proceedings against the contested decision.

81 The action is therefore admissible.

Substance

82 In support of the action, the applicant relies on four pleas in law, alleging, first, the lack of selectivity of the measure at issue, secondly, that State resources were not used, thirdly, a failure to state reasons and, fourthly, breach of the principle of the protection of legitimate expectations.

83 The Court considers it appropriate to address, first of all, the third plea, alleging a failure to state reasons, and, subsequently, the other pleas in the order in which they were put forward.

The third plea, alleging a failure to state reasons

84 By its third plea, the applicant essentially argues that the Commission failed to give reasons to the requisite legal standard for its assessment that the rule governing the forfeiture of losses constitutes the system of reference and the restructuring clause the exception to that system. In particular, in recital 67 of the contested decision, the Commission simply referred to the grounds which it had already put forward in the decision relating to the MoRaKG Law.

85 Furthermore, according to the applicant, the Commission incorrectly found that the subtraction of the losses carried forward was capped at EUR one million in total and also disregarded several facts. At issue in particular are the following circumstances: the previous forfeiture clause applied in parallel to the rule governing the forfeiture of losses until the end of 2012; unused losses are removed only where an acquisition is made by a person or a group of related persons, during a period of five years; the restructuring clause also applies to the deferral of interest and provides for three different types of situations; the retroactive insertion of the restructuring clause is simply intended to correct the legislature's mistake in incorrectly taking the view that the decree on restructuring could appropriately offset forfeiture of the loss carry-forwards.

86 According to settled case-law, the scope of the duty to state reasons depends on the nature of the measure in question and on the context in which it was adopted. The statement of reasons 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 European Union judicature to exercise its power of review and to enable the persons concerned to ascertain the reasons for it so that they can defend their rights and ascertain whether or not the measure is well founded. The reasoning is not required to go into every relevant factual and legal element, inasmuch as the question whether a statement of reasons satisfies the requirements of Article 296 TFEU must be assessed with reference not only to its wording but also to its context and the whole body of legal rules governing the matter in question (see judgments of 2 April 1998 in *Commission* v *Sytraval and Brink's France*, C-367/95 P, ECR, EU:C:1998:154, paragraph 63 and the case-law cited, and of 6 March 2003 in *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, T-228/99 and T-233/99, ECR,

EU:T:2003:57, paragraphs 278 and 279 and the case-law cited). In particular, the Commission is not obliged to adopt a position on all of the arguments relied on by the parties concerned. It is sufficient for it to set out the facts and the legal considerations having decisive importance in the context of the contested decision (see judgment in *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, EU:T:2003:57, paragraph 280 and the case-law cited).

87 With regard, more specifically, to the categorisation of a measure as State aid, the obligation to state reasons requires that the reasons which led the Commission to take the view that the measure concerned comes within the scope of Article 107(1) TFEU be stated (judgment of 13 June 2000 in *EPAC* v *Commission*, T-204/97 and T-270/97, ECR, EU:T:2000:148, paragraph 36).

88 It should also be borne in mind that the obligation laid down in Article 296 TFEU to state adequate reasons is an essential procedural requirement that must be distinguished from the question whether the reasoning is well founded, which goes to the substantive legality of the measure at issue (see judgment of 18 June 2015 in *Ipatau* v *Council*, C-535/14 P, ECR, EU:C:2015:407, paragraph 37 and the case-law cited).

89 In the contested decision, the Commission first sets out the relevant legislative context. In particular, recital 5 mentions the principle of loss carry-forward and recitals 10 and 14 reiterate the content of the rule governing the forfeiture of losses and the restructuring clause.

90 The Commission then devotes recitals 64 to 102 of the contested decision to an assessment of the selectivity of the measure at issue. In particular, in recitals 66 and 67 of the contested decision, it provides a definition of the system of reference.

91 In recital 66 of the contested decision, the Commission explains that 'the system of reference is the German corporate income tax system in its present form, and in particular the rules … which are laid down in [Paragraph] 8c(1) KStG'. It goes on to set out the content of that provision and concludes that 'forfeiture of losses is the general rule, i.e. the system of reference, in the case of a change of ownership of a company'.

92 In recital 67 of the contested decision, the Commission adds that in the case which was the subject of the decision relating to the MoRaKG Law, it had taken the view that Paragraph 8c(1) of the KStG constituted the applicable system of reference and found that an exception to Paragraph 8c(1) of the KStG allowing companies acquired by venture capital companies to carry losses forward despite the change in ownership was incompatible with the internal market. It further stated that 'the reasoning developed in that decision also applies to this case'.

93 It should be noted that, in the recitals of the contested decision referred to above, the Commission defined clearly the system of reference that it considered to be applicable for the purposes of assessing whether there was a selective advantage, in accordance with its obligation to state reasons.

94 In particular, it took account of the general principle of loss carry-forward and the relevant legislative framework and explained that it was of the opinion that the forfeiture of losses was the legislative framework of reference in the present case.

95 In that context, it must be stated that the reference to the decision relating to the MoRaKG Law, in recital 67 of the contested decision, constitutes an additional explanation that was not essential with respect to the definition of the system of reference.

96 Moreover, the alleged errors committed by the Commission in the review of the relevant system (see paragraph 85 above) do not affect the adequacy of the statement of reasons. Those arguments might relate, if applicable, to the assessment of the validity of the contested decision and will be examined as part of that plea (see paragraph 125 below).

97 The third plea in law must therefore be rejected.

The first plea, alleging the lack of prima facie selectivity of the measure at issue

98 The first plea relates, in essence, to the Commission's findings with respect to the selectivity of the measure at issue.

99 In that context, it should be noted at the outset that Article 107(1) TFEU prohibits aid 'favouring certain undertakings or the production of certain goods', that is to say, selective aid.

100 According to settled case-law, in order to classify a domestic tax measure as 'selective', it is necessary, first of all, to identify and examine the common or 'normal' tax regime applicable in the Member State concerned. It is in relation to that common or 'normal' tax regime that it is necessary, secondly, to assess and determine whether any advantage granted by the tax measure at issue may be selective by demonstrating that the measure derogates from that common regime inasmuch as it differentiates between economic operators which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation (see, to that effect, judgments of 8 September 2011 in *Paint Graphos and Others*, C-78/08 to C-80/08, ECR, EU:C:2011:550, paragraphs 50 and 54, and of 15 November 2011 in *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, ECR, EU:C:2011:732, paragraph 75). At the outcome of those first two stages of the review, a measure may be described as prima facie selective.

101 However, a measure which, although conferring an advantage on its recipient, is justified by the nature or general scheme of the tax system of which it is part does not satisfy that condition of selectivity (see, to that effect, judgment of 8 November 2001 in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, C-143/99, ECR, EU:C:2001:598, paragraph 42, and judgment in *Paint Graphos and Others*, paragraph 100 above, EU:C:2011:550, paragraph 64). Following that possible third stage of the review, a measure is classified as selective.

102 It must be recalled that, in order to prove that the measure at issue applies selectively to certain undertakings or to the production of certain goods, it is for the Commission to prove that it differentiates between undertakings which, with regard to the objective pursued by the system at issue, are in a comparable factual and legal situation, while it is for the Member State which has made such a distinction between undertakings in relation to charges to show that it is actually justified by the nature and general scheme of the system in question (see, to that effect, judgment of 8 September 2011 in *Commission* v *Netherlands*, C-279/08 P, ECR, EU:C:2011:551, paragraph 62 and the case-law cited).

103 It is in the light of that three-stage analysis, as it follows from the case-law, that it is appropriate to examine the first plea put forward by the applicant.

– The first part, alleging an error in the definition of the system of reference

104 In the contested decision, for the purposes of assessing the selectivity of the measure at issue, the Commission took account, first, of the fact that the loss carry-forward rule was of general application, secondly, of the rule governing the forfeiture of losses, which derogates from the first rule in those cases where the acquisition of a shareholding was prejudicial, and thirdly, of the restructuring clause, which permits derogations from the second rule and the application of the first rule in certain specific situations.

105 The Commission concluded from those elements, in recital 66 of the contested decision, that, in the context of the German corporation tax system, the forfeiture of losses constituted the system of reference, that is to say, the general rule applicable in all cases of a change in ownership of a company, and that the restructuring clause was an exception to that rule.

106 The applicant, supported by the Federal Republic of Germany, argues that the Commission erred in the determination of the system of reference for the purposes of assessing the selectivity of the measure at issue. The Commission, it is submitted, incorrectly found that the rule governing the forfeiture of losses was the general rule and that the restructuring clause was an exception to that rule.

107 According to the applicant, the system of reference consists of the loss carry-forward rule as a corollary of the constitutional principle of taxation according to ability to pay. The rule governing the forfeiture of losses is an exception to that principle and cannot be regarded as the system of reference, while the restructuring clause — which introduces an exception to that exception — merely re-establishes the general rule, namely the loss carry-forward rule, following the example of other exceptions, such as the clause governing groups of undertakings and that relating to hidden reserves.

108 The Commission argues, as a preliminary point, that the first part of the first plea is inadmissible, in that it is based on new facts that were not relied on in the administrative procedure. It recalls having established the rule governing the forfeiture of losses as the reference provision in the opening decision and in the decision relating to the MoRaKG Law, without the applicant, the Federal Republic of Germany or any other interested third parties having challenged that definition during the administrative procedure. It also states that national tax law is, from the point of view of EU law, a matter of fact, of which it did not have full knowledge at the time of the adoption of the contested decision and which it was not required to investigate of its own motion.

109 The Commission disputes the merits of the applicant's arguments.

110 As a preliminary point, the objection of inadmissibility raised by the Commission must be rejected. It is apparent from the very case-law relied on by the Commission in support of its argument that the assessment of the lawfulness of a decision in the light of the information available to the Commission when the decision was adopted concerns, in fact, the merits and not the admissibility of the plea in question (see, to that effect, judgments of 26 September 1996 in *France* v *Commission*, C-241/94, ECR, EU:C:1996:353, paragraph 33; of 24 September 2002 in *Falck and Acciaierie di Bolzano* v *Commission*, C-74/00 P and C-75/00 P, ECR, EU:C:2002:524, paragraph 168; of 14 January 2004 in *Fleuren Compost* v *Commission*, T-109/01, ECR, EU:T:2004:4, paragraph 49; of 6 April 2006 in *Schmitz-Gotha Fahrzeugwerke* v *Commission*, T-17/03, ECR, EU:T:2006:109, paragraph 54; and of 7 December 2010 in *Frucona Košice* v *Commission*, T-11/07, ECR, EU:T:2010:498, paragraph 49).

111 As regards the merits of the arguments put forward by the applicant, it should be recalled that in the contested decision the Commission established, in essence, the rule governing the forfeiture of losses as being the general rule in respect of which it was appropriate to examine whether there was a distinction between the undertakings that were in a comparable factual and legal situation, while the applicant refers to the more general rule of loss carry-forward, which applies to all taxation.

112 In that regard, it should be recalled, on the one hand, that it is open to all undertakings to make use of the loss carry-forward rule in the context of the levying of corporation tax and, on the other, that the rule governing the forfeiture of losses restricts the use of that option in the event of the acquisition of a shareholding equal to or greater than 25% of the share capital and withdraws it in the event of the acquisition of more than 50% of the share capital. The latter rule therefore applies systematically to all cases of a change of ownership of 25% or more of a company's share capital, without drawing any distinction on the basis of the nature or characteristics of the undertakings concerned.

113 Furthermore, the restructuring clause is worded in the form of an exception to the rule governing the forfeiture of losses and applies only to those well-defined situations which are subject to that rule.

114 Accordingly, it is clear that the rule governing the forfeiture of losses, like the loss carry-forward rule, is part of the legislative framework in the context of which the measure at issue arises. In other words, the general loss carry-forward rule, as limited by the rule governing the forfeiture of losses, constitutes the relevant legal framework in the present case and it is precisely within that framework that it is appropriate to check whether the measure at issue differentiates between operators in a comparable factual and legal situation within the meaning of the case-law cited in paragraph 100 above, that question being set out under the second part of the first plea.

115 It must therefore be held that the Commission did not err when, while noting the existence of a more general rule, namely the loss carry-forward rule, it determined that the legislative framework of reference established in order to assess the selectivity of the measure at issue was constituted by the rule governing the forfeiture of losses.

116 That conclusion is not called into question by the specific arguments put forward by the applicant.

117 First, to the extent that the applicant seeks to rely on a failure to state reasons, alleging that, in support of its position, the Commission merely referred to the decision relating to the MoRaKG Law, it must be held that that complaint was rejected in the context of the third plea, alleging a failure to state reasons (see paragraphs 84 to 97 above). Furthermore, the fact that the German authorities may or may not have conceded, during the administrative procedure which gave rise to the decision relating to the MoRaKG Law, that the measure at issue was selective is irrelevant in the present case because it has no impact on the assessment, carried out in the paragraphs above, of the legislative framework of reference as defined by the Commission.

118 Secondly, the fact that the principle of loss carry-forward is part of the fundamental principles of German tax law is also irrelevant. Assuming that the rule of loss carry-forward is one of those fundamental principles and that the forfeiture of losses is an exception to that rule, the fact none the less remains that the latter rule is part of the legislative framework of reference of which the measure at issue forms part and in the light of which it is appropriate to assess the selectivity of that measure.

119 Thirdly, as regards the argument that, on the one hand, the right to carry losses forward, as an application of fundamental principles, may be restricted by the legislature only if there are compelling grounds for doing so, and that, on the other, a change in share ownership in no way affects the taxation of a company, since shareholders and undertakings are clearly distinct from one another, that argument has no bearing on the definition of the system of reference for the purposes of the assessment of the selectivity of the measure at issue. What matters is that there is a provision derogating from the principle of loss carry-forward which, as in the case of that principle, is part of the system of reference of which the measure at issue forms part.

120 Fourthly, the argument that the rule governing the forfeiture of losses did not lead to a change of system and seeks, like the former rule, to prevent unlawful use of loss carry-forward is also irrelevant. The objective of tackling abuse relates to the question whether the measure at issue differentiates between operators who are in a comparable factual and legal situation, which is the subject of the second part of the present plea. Furthermore, the issue of whether the Commission did or did not challenge the lawfulness of the previous restructuring clause has no relevance in the assessment of the new clause.

121 Fifthly, it is clear that the existence of other derogations from the rule governing the forfeiture of losses is not sufficient, by itself, to demonstrate that that rule is not part of the relevant system of reference for the purposes of assessing whether the measure at issue is selective.

122 Sixthly, the same applies with regard to the argument relating to the doubts of national courts as to the constitutionality of the rule governing the forfeiture of losses. That does not preclude the conclusion that, as long as it has not been repealed, that rule is part of the system of reference.

123 Nor, seventhly, is the conclusion mentioned in paragraph 115 above called into question by the arguments put forward by the applicant in the reply and seeking to show that the rule governing the forfeiture of losses constitutes a derogation, namely the fact that that rule is characterised by a large number of constitutive elements restricting its scope, and by nuanced legal consequences requiring interpretation; the fact that it is a derogation is further confirmed by the legislative context and technique.

124 Those arguments are irrelevant since the classification of that rule as an exception to a superior rule of law does not preclude it from being part of the system of reference of which the measure at issue forms part.

125 Finally, the incorrect assertion, set out in recital 5 of the contested decision, that the loss carry-forward was restricted to a total amount of EUR one million had no impact on the assessment of the selectivity of the measure at issue. The same is true with regard to the error committed by the Commission when it took the view that the previous clause concerning forfeiture of losses had been repealed with effect from 1 January 2008, whereas it applied until at least 2012.

126 In conclusion, it must be held that the Commission did not err in defining the system of reference.

127 The first part of the first plea must therefore be rejected.

– The second part, alleging an error in the assessment of the legal and factual situation of the undertakings requiring restructuring and in the classification of the restructuring clause as a general measure

128 In the contested decision, the Commission found that the rule governing the forfeiture of losses had a broader scope than that of the former rule (recital 10), that the rule did not originally provide for any exception (recital 11) and that, as is apparent from the explanatory memorandum to the 2008 Law on Business Taxation Reform (see paragraph 6 above), the objective of the rule was twofold: first, to simplify the rules and, secondly, to target abuse better (recital 12). It also noted that the lack of an express exception allowing loss carry-forward in the event of restructuring was offset by the possibility for the tax authorities to waive tax debts on the basis of considerations of equity (recital 12; see paragraph 7 above).

129 On the basis of those elements, in recitals 68 to 79 of the contested decision, the Commission, first of all, found that the objective of the corporation tax system was to generate revenue for the State budget and that the objective of the rule governing the forfeiture of losses was to prevent undertakings which had changed ownership from carrying forward their losses. Next, it found that, in the light of that objective, all companies of which 25% or more of the share capital had changed ownership were in a comparable factual and legal situation. Finally, it found that, within that category, the restructuring clause differentiated between, on the one hand, loss-making companies that were otherwise healthy and, on the other, companies which, according to the conditions laid down by the restructuring clause, were insolvent or over-indebted, or at risk thereof.

130 First of all, the applicant argues that the restructuring provision does not differentiate between economic operators who are in a comparable factual and legal situation, but is a general measure of fiscal policy falling under the tax sovereignty of Member States, which applies under the same conditions to all companies for which there is an imminent risk of insolvency or over-indebtedness, and that that clause also does not fall within the discretion of the administrative authorities.

131 It states that companies requiring restructuring and healthy companies are not in the same factual and legal situation. The rule governing the forfeiture of losses excludes loss carry-forward where the new shareholder is in a position to exercise a decisive influence on the future of the company and therefore in principle has full control of the use of losses, whereas the restructuring clause, with its strict conditions, applies in a situation in which the new shareholder has no ability to control losses.

132 Secondly, the applicant invokes a deficient statement of reasons, on the ground that the Commission failed to check whether the restructuring clause constituted a general measure.

133 Since the system of reference has been identified as being constituted by the rule governing the forfeiture of losses, it is appropriate, first of all, to check whether, in the light of the objective pursued by the relevant tax system, the companies benefitting from the restructuring clause are in a comparable factual and legal situation to that of other companies that are subject to the rule governing the forfeiture of losses, this being a matter for the Commission to show within the meaning of the case-law cited at paragraph 102 above.

134 In essence, according to the Commission, since the objective of the relevant tax system in the present case is to prevent companies which have undergone a change in share ownership from carrying their losses forward, all companies which have undergone a change in share ownership are in a comparable factual and legal situation, whether they benefit from the restructuring clause or not. The measure at issue is therefore prima facie selective, since it benefits only those companies which fulfil the requirements of that clause.

135 By contrast, according to the applicant, since the objective of the scheme at issue is to avoid abuse of the loss carry-forward rule, only the companies that fulfil the requirements of the restructuring clause are in a comparable factual and legal situation, since they are not in a position to abuse the loss carry-forward rule.

136 As set out in paragraph 114 above, the relevant legal framework in the present case is made up of the general rule of loss carry-forward, as limited by the rule governing the forfeiture of losses. It is therefore appropriate to consider that, as is apparent from recital 71 of the contested decision, the relevant purpose of the tax system of reference is to prevent companies which have changed ownership from carrying their losses forward. In other words, the possibility of carrying losses forward is restricted or withdrawn in the event that, following an acquisition of a shareholding equal to or greater than 25% of its share capital, the ownership of the company which has accumulated losses is changed substantially.

137 It follows that all companies which have undergone such a change of ownership are in a comparable factual and legal situation, regardless of whether they are experiencing difficulties within the meaning of the restructuring clause.

138 By contrast, the measure at issue does not cover all companies whose ownership has changed substantially, but applies to a very specific category of companies, namely those which, according to the wording of the restructuring clause at the time of acquisition ‘are, or are likely to be, insolvent or over-indebted’ (‘the undertakings in difficulty’).

139 It must be held that that category does not cover all companies that are in a comparable legal and factual situation with regard to the objective of the tax system at issue.

140 Even if, as argued by the applicant, the relevant objective of the tax system is to prevent abuse of the loss carry-forward rule by avoiding the purchase of ‘empty-shell companies’, the fact remains that the measure at issue applies only to companies that fulfil certain conditions, in particular undertakings in difficulty.

141 Even assuming that, in situations which are the subject of the measure at issue, there is no risk of abuse, in accordance with the objective under consideration, it must be stated that that measure does not allow loss carry-forward in the event of a significant change in the ownership of the company concerned, where that change does not concern an undertakings in difficulty, even if the change in ownership does not relate to the purchase of 'empty-shell companies' and therefore does not create a risk of abuse. Loss carry-forward is prohibited even if the other conditions of the restructuring clause, relating in particular to the maintenance of the essential structures of the company, namely the conditions listed under (c) to (e) of the restructuring clause, are fulfilled. In other words, the conditions listed under (a) and (b) of the restructuring clause are not linked to the objective of preventing abuse. They therefore have the effect of favouring undertakings in difficulty.

142 It must therefore be concluded that the Commission did not err in finding that the measure at issue differentiated between operators which were, in the light of the objective assigned to the tax system, in a comparable factual and legal situation, within the meaning of the case-law cited in paragraph 100 above.

143 Secondly, the argument of the applicant and of the intervener that the measure at issue is a general measure, in that it benefits any undertaking in difficulty, cannot be upheld.

144 The question whether the measure is of a general nature or not, in the context of the review of the selectivity of a tax measure, rests on the question whether, in relation to the common or normal tax regime, the measure at issue differentiates between operators which are, in the light of the objective pursued by that regime, in a comparable factual and legal situation. As stated in the paragraphs above, in the contested decision, the Commission correctly found that the measure at issue differentiates between companies, namely, between those companies which meet the requirements of the measure at issue and other companies which are in a comparable legal and factual situation with regard to the objective pursued by the regime at issue. Even supposing that that objective, as argued by the applicant, is to prevent abuse of the loss carry-forward rule, it must be held that the measure at issue, whether considered alone or together with the other two exceptions above, does not cover all companies that are the subject of a prejudicial shareholding acquisition which does not create such a risk of abuse.

145 Moreover, it should be noted that, contrary to the applicant's arguments, the measure at issue is not a general measure, as being potentially available to all companies within the meaning of the judgment of 7 November 2014 in *Autogrill España* v *Commission* (T-219/10, ECR, under appeal, EU:T:2014:939, paragraphs 44 and 45). The measure at issue defines its scope *ratione personae*. It covers only one category of companies that are in a specific situation, namely undertakings in difficulty. It is, therefore, prima facie selective.

146 Furthermore, the differences relied on by the applicant between companies requiring restructuring and healthy companies with regard to access to capital and the availability of hidden reserves are not relevant with respect to the objective pursued by the tax system, even taking account of the objective of preventing abuse of the loss carry-forward rule. Such differences are relevant only in the light of the objective of favouring the restructuring of companies which benefit from the measure at issue. However, that objective is not relevant in this case, and the applicant, moreover, does not contend that it is.

147 Finally, regarding the argument that the restructuring clause is an automatic enforcement mechanism and that the objectives pursued by the legislation on corporation tax have not only a fiscal but also a political dimension, suffice it to point out that such arguments are ineffective since, even assuming that they are well founded, they cannot have any bearing on the selectivity of the measure at issue.

148 The second part of the first plea must therefore be rejected.

– The third part, relating to the justification of the measure at issue on the basis of the nature and general scheme of the German tax system

149 First, the applicant argues that the restructuring clause, combined with the clause governing groups of undertakings and the clause governing hidden reserves, contributes to the application of fundamental principles forming an integral part of the German system of corporation tax, in particular the principle of the transfer of losses between different tax periods, stemming from the guiding principles of objective net worth and taxation according to ability to pay, and the principle of separation, pursuant to which, under the applicable system of reference in the German law on corporation tax, the taxation of a company does not depend on its shareholders.

150 Secondly, the applicant submits that the restriction of the application of the restructuring clause to companies requiring restructuring is also justified in the light of the fiscal interest, that is to say, in the light of the objective, inherent in tax law, of collecting revenue in order to finance State expenditure. By not laying down any fiscal impediment to restructurings, it argues, the German legislature allows companies requiring restructuring to correct their financial situation, which increases future tax revenue.

151 Thirdly, the applicant argues that the restriction to companies requiring restructuring is also based on objective differences between, on the one hand, healthy companies temporarily incurring losses which are able to raise capital on the market without having to resort to a change of ownership and, on the other hand, companies requiring restructuring, which are often no longer able to have recourse to that possibility. The Federal Republic of Germany adds, on the one hand, that, in the event of the acquisition of a shareholding for the purposes of carrying out a restructuring, the purchaser does not have control over losses and, on the other, that businesses requiring restructuring which do not have hidden reserves cannot benefit from the clause relating to hidden reserves.

152 It should be borne in mind that, according to the case-law cited in paragraph 101 above, a measure which — while differentiating between operators in a comparable factual and legal situation with regard to the objective pursued by the relevant tax system — is justified by the nature or general scheme of the system of which it forms part does not fulfil the condition of selectivity.

153 In that regard, a distinction must be drawn between, on the one hand, the objectives attributed to a particular tax system which are extrinsic to it and, on the other, the mechanisms forming an essential part of the tax system itself which are necessary for the achievement of such objectives, since those objectives and mechanisms, as founding or guiding principles of the tax system at issue, may support such a justification, which it is for the Member State to demonstrate (see judgments in *Paint Graphos and Others*, paragraph 100 above, EU:C:2011:550, paragraph 65 and the case-law cited, and of 7 March 2012 in *British Aggregates* v *Commission*, T-210/02 RENV, ECR, EU:T:2012:110, paragraph 84 and the case-law cited). Consequently, tax exemptions which are the result of an objective that is unrelated to the tax system of which they form part cannot circumvent the requirements under Article 107(1) TFEU (see judgment in *Paint Graphos and Others*, paragraph 100 above, EU:C:2011:550, paragraph 70).

154 It should also be borne in mind that a national measure may be justified by the nature or general scheme of the tax system at issue only if, first, it is consistent not only with the characteristics forming an essential part of the tax system at issue but also with the implementation of that system and, secondly, it is consistent with the principle of proportionality and does not go beyond what is necessary, in that the legitimate objective being pursued could not be attained by less far-reaching measures (see, to that effect, judgment in *Paint Graphos and Others*, paragraph 100 above, EU:C:2011:550, paragraphs 73 to 75).

155 In the contested decision, the Commission drew a distinction between, on the one hand, the objective of the rule governing the forfeiture of losses, and, on the other, the objective of the restructuring clause.

156 With respect to the objective of the rule governing the forfeiture of losses, although, during the administrative procedure, the German authorities invoked the objective of 'prevent[ing] abuse of the loss carry-forward … in the form of purchases of empty shell companies' (recital 85 of the contested decision), the Commission found, as is apparent from the changes made to the former rule governing the forfeiture of losses by the new rule, that the objective was to 'finance a reduction in the corporate income tax rate from 25% to 15%' (recital 86 of the contested decision).

157 By contrast, the objective of the restructuring clause was, according to the Commission, to tackle the problems caused by the economic and financial crisis and to support ailing companies in the context of that crisis (recitals 87 and 88 of the contested decision). It concluded that the purpose of that clause was extrinsic to the tax system (recital 89 of the contested decision).

158 It must be stated that it is clear from the wording of the measure at issue that its objective is to promote the restructuring of undertakings in difficulty. If that were not the case, it would not be possible to explain why the conditions for the application of Paragraph 8c(1a)(a) and 8c(1a)(b) of the KStG (see paragraph 10 above) include, respectively, a requirement that the purpose of the acquisition of the shares is the restructuring of the company and that, at the time of the acquisition, the company is insolvent or over-indebted, or at risk thereof. Moreover, the applicant itself acknowledges that, through the measure at issue, the legislature is also pursuing the goal of enabling companies affected by the crisis which are insolvent to become healthy again.

159 It is therefore clear that the objective, or at least the main objective, of the measure at issue is to facilitate the restructuring of undertakings in difficulty.

160 In that regard, it should be noted that the aforementioned objective does not come within the founding or guiding principles of the tax system and is therefore not intrinsic, but extrinsic thereto (see, to that effect and by analogy, judgments of 6 September 2006 in *Portugal* v *Commission*, C-88/03, ECR, EU:C:2006:511, paragraph 82, and of 18 July 2013 in P, C-6/12, ECR, EU:C:2013:525, paragraph 30), without it being necessary to check whether the measure at issue is proportionate to the objective pursued.

161 In any event, the measure at issue is also not justified in the light of the arguments put forward by the applicant and the intervener.

162 First of all, the measure cannot be justified under the principle of taxation according to ability to pay.

163 Regardless of the fact that that justification is not apparent from the explanatory memorandum to the legislation at issue, it appears to be related to the objective, which is specific to the rule governing the forfeiture of losses, of tackling abuse relating to the carry-forward of losses. In essence, according to that argument, since, on the one hand, the rule governing the forfeiture of losses is intended to prevent abuse and, on the other, that in the event of restructuring there is no abuse, it follows that the implementation of the restructuring clause is justified by the same logic as that underlying the application of the rule governing the forfeiture of losses and is restricted to restoring the application of the general principle of loss carry-forward as an expression of the principle of taxation according to ability to pay.

164 However, even if that interpretation is correct, it must be held that the measure at issue is not consistent with the objective pursued. As explained in the context of the first plea, the measure at issue applies only to undertakings in difficulty. In those circumstances, it is not clear why the

principle of taxation according to the ability to pay requires that a company in difficulty should be able to benefit from loss carry-forward, where that carry-forward is denied to a healthy company that has incurred losses and meets the other requirements of the restructuring provision.

165 Nor, furthermore, is the measure at issue justified, on the one hand, by differences between the prejudicial acquisition of a shareholding and the acquisition of a shareholding for the purposes of restructuring and, on the other, by objective differences between taxpayers. According to the applicant, supported by the Federal Republic of Germany, in the event of the acquisition of a shareholding for the purposes of restructuring, the new shareholder does not have full control over how losses are used. In addition, companies requiring restructuring, in contrast to healthy companies, do not have the ability to finance themselves on capital markets or to seek a buyer. Nor are they able to retain their losses under the clause governing hidden reserves.

166 In that regard, it must be held that the argument relating to the lack of control over the use of losses is not consistent. Other companies which do not fulfil the requirements of the restructuring clause may also encounter economic difficulties and be unable to exert control over how losses are used, while being excluded from the application of the restructuring clause. Moreover, the difference in position between companies requiring restructuring and healthy companies with regard to access to capital and the availability of hidden reserves is not relevant in the present case. As the Commission correctly noted in recital 91 of the contested decision, the possible objective of providing ailing companies with access to capital is not an essential part of the tax system.

167 The same is true with respect to the applicant's argument that it is in the interest of the German tax authorities to allow companies capable of being restructured to improve their finances, in order to limit the risk of their becoming insolvent and to increase the chances of tax authorities obtaining, or even increasing, tax revenues.

168 That argument reproduces that relied on by the Federal Republic of Germany during the administrative procedure and rejected by the Commission in recitals 57 to 63 of the contested decision, to the effect that the restructuring clause is compatible with the 'private market creditor' principle, inasmuch as it corresponds to the conduct of a prudent creditor engaged in a long-term contract with a debtor.

169 However, it must be held that the benefit in question is granted automatically and without any examination seeking to establish in actual fact, as a private creditor would do, first, the risk that the beneficiary may no longer be able to pursue its economic activities and must therefore stop any payments to its creditors and, secondly, how that beneficiary will be able, once its tax debt has been reduced, to operate profitably in order to meet its future obligations. As the Commission correctly points out in recital 60 of the contested decision, a waiver of a tax debt without any assessment of the future prospects or strategic importance of the debtor is not consistent with prudent conduct.

170 Accordingly, it must be held that neither the applicant nor the Federal Republic of Germany has provided any evidence making it possible to justify the measure at issue in accordance with the case-law cited in paragraphs 152 to 154 above.

171 In conclusion, the third part of the first plea, and thus the first plea in its entirety, must be rejected.

The second plea, alleging the absence of use of State resources

172 By its second plea, the applicant submits that the restructuring clause does not consist in granting a financial advantage to a company, but solely in not depriving that company of a pre-existing financial situation. Since the maintenance of loss carry-forwards corresponds to the principle of unlimited loss carry-forwards, enshrined in German constitutional law, loss carry-forwards, in principle, are assets belonging to companies subject to tax.

173 Consequently, at no time did the Federal Republic of Germany have tax revenues from positive revenue, corresponding to equivalent losses from the same tax period or previous tax periods.

174 It should be recalled that, in recital 50 of the contested decision, the Commission concluded that the possibility granted to certain undertakings by the German Government of reducing their corporation tax burden through loss carry-forward led to the foregoing of revenue and constituted State aid.

175 According to settled case-law, the definition of aid is more general than that of a subsidy, given that it includes not only positive benefits, such as subsidies themselves, but also State measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which thus, without being subsidies in the strict sense of the word, are similar in character and have the same effect (judgment in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, paragraph 101 above, EU:C:2001:598, paragraph 38, see also judgment in *Paint Graphos and Others*, paragraph 100 above, EU:C:2011:550, paragraph 45 and the case-law cited).

176 It follows that a measure by which the public authorities grant certain undertakings favourable tax treatment, which, although not involving the transfer of State resources, places the recipients in a financial position which is more favourable than that of other taxpayers, amounts to State aid within the meaning of Article 107(1) TFEU. By contrast, advantages resulting from a general measure applicable without distinction to all economic operators do not constitute State aid within the meaning of Article 107 TFEU (see judgment in *Commission and Spain* v *Government of Gibraltar and United Kingdom*, paragraph 100 above, EU:C:2011:732, paragraphs 72 and 73 and the case-law cited).

177 In the present case, it should be noted that the origin of the advantage granted to companies covered by the restructuring clause is the waiver by a Member State of tax revenue which it would normally have received, inasmuch as it is that waiver which enabled beneficiaries to acquire prejudicial shareholdings on conditions which are in tax terms more advantageous (see, to that effect, judgment of 19 September 2000 in *Germany* v *Commission*, C-156/98, ECR, EU:C:2000:467, paragraph 26).

178 It is also necessary to reject the applicant's argument alleging, in essence, that, since the maintenance of loss carry-forwards corresponds to the constitutional principle of unlimited loss carry-forward, the revenue not collected as a result of the application of the loss carry-forward rule constitutes an asset which never belonged to the State.

179 In this regard, according to settled case-law, Article 107(1) TFEU does not distinguish by reference to the causes or objectives of the measures of State intervention but defines them in relation to their effects (see, to that effect, judgment in *Commission and Spain* v *Government of Gibraltar and United Kingdom*, paragraph 100 above, EU:C:2011:732, paragraph 87 and the case-law cited).

180 As has been noted in the assessment of the selectivity of the measure at issue, the Commission established correctly that the rule governing the forfeiture of losses was part of the system of reference. It is an integral part of the law of the Federal Republic of Germany and is therefore subject to a presumption of legality. Under that rule, the tax revenue collected as a result of the non-application of the loss carry-forward rule is revenue intended, in principle, for the State budget.

181 Moreover, the rule governing the forfeiture of losses did not initially provide for any exceptions. The restructuring clause and the other exceptions to the rule governing the forfeiture of losses were introduced after that rule, even though the restructuring clause applies retroactively from the same date of entry into force as the rule governing the forfeiture of losses. This demonstrates that the constitutional legality of the introduction of the rule governing the forfeiture of losses was not subject, according to the German legislature, to any exceptions.

182 In any event, even if the legality of the rule governing the forfeiture of losses was called into question, the very fact that that rule was applied for a certain period is sufficient to establish that State resources were mobilised because of the application of the restructuring clause during the same period. The concept of State aid is an objective one which must be examined in the light of the anti-competitive effects caused by the aid measure in question, and not in the light of other factors such as the lawfulness of the measure by which the aid is granted (see, to that effect, judgments of 22 December 2008 in *British Aggregates* v *Commission*, C-487/06 P, ECR, EU:C:2008:757, paragraph 85 and the case-law cited, and of 7 October 2010 in *DHL Aviation and DHL Hub Leipzig* v *Commission*, T-452/08, EU:T:2010:427, paragraph 40).

183 It must therefore be concluded that, in finding in the contested decision that the measure at issue had been granted by way of State resources because it was likely to lead to lower tax revenues, the Commission did not err in law.

184 The second plea in law must therefore be rejected.

The fourth plea, alleging infringement of the principle of the protection of legitimate expectations

185 By its fourth plea, the applicant essentially pleads the existence of a legitimate expectation based, first, on the binding information received from the national tax authorities and, secondly, on the difficulty, if not the impossibility, in the circumstances of the present case, of perceiving the restructuring clause as State aid and of checking whether the procedure under Article 108 TFEU had, or should have, been complied with, that difficulty being compounded by the existence in other Member States of similar provisions which had not been notified or challenged in the light of Article 107(1) TFEU.

186 Under the second sentence of Article 14(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 [EC] (OJ 1999 L 83, p. 1), the Commission will not require recovery of aid where this would be contrary to a general principle of EU law.

187 According to established case-law, the principle of the protection of legitimate expectations applies to any individual in a situation in which an institution of the European Union, by giving that person precise assurances, has led him to entertain well-founded expectations. Precise, unconditional and consistent information, in whatever form it is given, constitutes such assurances (see judgment of 16 December 2010 in *Kahla Thüringen Porzellan* v *Commission*, C-537/08 P, ECR, EU:C:2010:769, paragraph 63 and the case-law cited).

188 It should also be recalled that, according to settled case-law, undertakings receiving aid cannot, in principle, have a legitimate expectation as to the lawfulness of the aid unless it has been granted in compliance with the procedure laid down in the FEU Treaty. A diligent economic operator must normally be able to determine whether that procedure has been followed (see judgment of 20 March 1997 in *Alcan Deutschland*, C-24/95, ECR, EU:C:1997:163, paragraph 25 and the case-law cited).

189 In the present case, it must be held, first, that, since the measure was not notified to the Commission within the meaning of Article 108(3) TFEU, doubts or difficulties concerning the interpretation of the measure at issue as State aid cannot, of themselves, justify a legitimate expectation on the part of the applicant.

190 Next, in so far as the applicant bases its legitimate expectation on the binding information, it should be recalled that although, admittedly, a recipient of illegally granted aid is not precluded from relying on exceptional circumstances on the basis of which it had legitimately assumed the aid to be lawful and thus from declining to refund that aid, it is, however, up to that recipient to assert those circumstances before the national authorities or national courts, by challenging the national decision ordering the recovery pursuant to which those national authorities transpose the Commission decision. If such a case is brought before a national court, it is for that court to assess the circumstances of the case, if necessary after obtaining a preliminary ruling on interpretation (see, to that effect, judgments of 7 March 2002 in *Italy* v *Commission*, C-310/99, ECR, EU:C:2002:143, paragraph 103; of 27 January 1998 in *Ladbroke Racing* v *Commission*, T-67/94, ECR, EU:T:1998:7, paragraphs 182 and 183; and *Fleuren Compost* v *Commission*, paragraph 110 above, EU:T:2004:4, paragraphs 136 and 137). Pursuant to that case-law, the applicant may therefore not rely on the existence of binding information by contending that the contested decision goes against the principle of the protection of legitimate expectations (see, to that effect, judgment of 16 July 2014 in *Zweckverband Tierkörperbeseitigung* v *Commission*, T-309/12, EU:T:2014:676, paragraph 237).

191 It should also be borne in mind that the conduct of a national authority responsible for applying EU law, which acts in breach of that law, cannot give rise to a legitimate expectation, on the part of a trader, of favourable treatment contrary to EU law (see judgment of 4 October 2007 in *Commission* v *Italy*, C-217/06, EU:C:2007:580, paragraph 23 and the case-law cited), and that the recipient's obligation to ensure that the procedure set out in Article 108(3) TFEU has been complied with cannot, in fact, depend on the conduct of the State authorities, even if the latter were responsible for the illegality of the aid decision to such a degree that revocation appears to be a breach of good faith (see, to that effect, judgment in *Alcan Deutschland*, paragraph 188 above, EU:C:1997:163, paragraph 41).

192 Finally, the applicant may not base any argument on the existence of allegedly similar measures in other Member States. It must be stated, first, that those measures are found in distinct legislative frameworks, next, that there is nothing in the file to suggest that the Commission had given any assurances as to the legality of such measures within the meaning of Article 107(1) TFEU and, finally, that such a circumstance may not be validly invoked by the applicant, since, in any event, the principle of equal treatment must be reconciled with the principle of legality, according to which no one may rely, to his own benefit, on an unlawful act committed in favour of another (judgments of 14 May 1998 in *SCA Holding* v *Commission*, T-327/94, ECR, EU:T:1998:96, paragraph 160, and in *Mayr-Melnhof* v *Commission*, T-347/94, ECR, EU:T:1998:101, paragraph 334; and judgment of 20 March 2002 in *LR AF 1998* v *Commission*, T-23/99, ECR, EU:T:2002:75, paragraph 367).

193 The same is true with regard to the reference to the former rule governing the forfeiture of losses, which was a different system and was never made subject to a review by the Commission in terms of compliance with the Treaty rules on State aid.

194 The fourth plea must therefore be rejected and, consequently, the action must be dismissed in its entirety.

Costs

195 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, under Article 134(3) of those rules, where each party succeeds on some and fails on other heads, and if it appears justified in the circumstances of the case, the Court may decide that one party, in addition to bearing its own costs, is to pay a proportion of the costs of the other party.

196 In the present case, it must be noted that the Court has, on the one hand, rejected the objection of inadmissibility raised by the Commission pursuant to Article 114 of the Rules of Procedure of 2 May 1991 and, on the other, dismissed the action in its entirety as being unfounded.

197 In view of those circumstances, the applicant must be ordered to bear its own costs and to pay two thirds of the Commission's costs, and the Commission must be ordered to bear one third of its own costs.

198 Under Article 138(1) of the Rules of Procedure, Member States which have intervened in proceedings are to bear their own costs. The Federal Republic of Germany must therefore bear its own costs.

On those grounds,

THE GENERAL COURT (Ninth Chamber)

hereby:

1. Rejects the objection of inadmissibility;

2. Dismisses the action as unfounded;

3. Orders GFKL Financial Services AG to bear its own costs and to pay two thirds of the European Commission's costs, and orders the Commission to bear one third of its own costs;

4. Orders the Federal Republic of Germany to bear its own costs.

Berardis Czúcz Popescu

Delivered in open court in Luxembourg on 4 February 2016.

[Signatures]

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