Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

26 September 2024*

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

In Joined Cases C-790/21 P and C-791/21 P,

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

Covestro Deutschland AG, established in Leverkusen (Germany), represented by D. Fouquet, T. Hartmann, M. Kachel, J. Panknin and R. Wilde, Rechtsanwälte,

appellant in Case C-790/21 P,

the other parties to the proceedings being:

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

defendant at first instance,

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

intervener at first instance,

and

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

appellant in Case C-791/21 P,

the other parties to the proceedings being:

Covestro Deutschland AG, established in Leverkusen, represented by D. Fouquet, T. Hartmann, M. Kachel, J. Panknin and R. Wilde, Rechtsanwälte,

* Language of the case: German.

applicant at first instance,

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

defendant at first instance,

THE COURT (Third Chamber),

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

Advocate General: L. Medina,

Registrar: D. Dittert, Head of Unit,

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

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

gives the following

Judgment

1 By its appeal in Case C-790/21 P, Covestro Deutschland AG ('Covestro') asks the Court of Justice to set aside the judgment of the General Court of the European Union of 6 October 2021, *Covestro Deutschland* v *Commission* (T-745/18, EU:T:2021:644; 'the judgment under appeal'), by which the General Court dismissed its action for annulment of Commission Decision (EU) 2019/56 of 28 May 2018 on aid scheme SA.34045 (2013/c) (ex 2012/NN) implemented by Germany for baseload consumers under Paragraph 19 StromNEV (OJ 2019 L 14, p. 1; 'the decision at issue').

2 By its appeal in Case C-791/21 P, the Federal Republic of Germany asks the Court to set aside the judgment under appeal.

3 By its cross-appeals, brought in Cases C-790/21 P and C-791/21 P, the European Commission also asks the Court to set aside the judgment under appeal.

Legal context

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

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

5 Article 1(h) of that regulation provides:

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

…

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

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

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

Background to the dispute and the decision at issue

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

The legislative and regulatory measures at issue

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

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

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

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

11 The determination of the general charges takes into account the following two factors, namely the 'simultaneity function', which expresses the probability that the individual consumption of a user contributes to the annual peak load of the network level concerned, and the maximum revenue

level per operator, as set by the Bundesnetzagentur (Federal Network Agency, Germany; 'the BNetzA') on the basis of benchmarking with other network operators, aimed at preventing costs resulting from inefficiencies from being recovered through network charges.

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

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

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

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

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

The measures at issue

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

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

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

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

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

The system of network charges subsequent to the measures at issue

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

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

The administrative procedure and the decision at issue

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

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

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

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

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

27 The Commission therefore decided as follows:

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

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

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

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

The action before the General Court and the judgment under appeal

28 By application lodged at the Registry of the General Court on 20 December 2018, Covestro brought an action for annulment of the decision at issue.

29 By decision of the President of the Sixth Chamber of the General Court of 4 June 2019, the Federal Republic of Germany was granted leave to intervene in support of the form of order sought by Covestro, in accordance with that Member State's request.

30 In support of its action, Covestro put forward four pleas in law. The first plea, which it withdrew at the hearing, alleged that the duration of the formal investigation procedure was excessive. The second plea alleged that there was no State aid within the meaning of Article 107(1) TFEU. The third plea claimed that the alleged aid was compatible with the internal market under Article 107(3)(b) TFEU and Article 107(3)(c) TFEU. The fourth plea alleged that the recovery order was unlawful on the ground that it was adopted in breach, first, of the principle of non-discrimination and, second, of the principle of the protection of legitimate expectations.

31 By the judgment under appeal, the General Court declared the action admissible; next, it held that there was no longer any need to adjudicate on the first plea following Covestro's decison to withdraw it; and lastly, it rejected the second to fourth pleas and, consequently, dismissed the action for annulment in its entirety.

Procedure before the Court and forms of order sought

32 By its appeal in Case C-790/21 P, Covestro claims that the Court should:

– set aside the judgment under appeal and annul the decision at issue in respect of 2012 and 2013 in its entirety or, alternatively, in so far as that decision concerns Covestro;

– in the alternative, set aside the judgment under appeal and refer the case back to the General Court; and

– order the Commission to pay the costs.

33 The Federal Republic of Germany contends that the Court should uphold the appeal in Case C-790/21 P and order the Commission to pay the costs.

34 The Commission contends that the Court should dismiss the appeal in Case C-790/21 P and order Covestro to pay the costs.

35 By its appeal in Case C-791/21 P, the Federal Republic of Germany claims that the Court should:

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

– annul the decision at issue; and

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

36 Covestro contends that the Court should uphold the appeal in Case C-791/21 P and order the Commission to pay the costs.

37 The Commission contends that the Court should dismiss the appeal in Case C-791/21 P and order the Federal Republic of Germany to pay the costs.

38 By its cross-appeals in Cases C-790/21 P and C-791/21 P, the Commission claims that the Court should:

– set aside the judgment under appeal;

– declare the action for annulment to be inadmissible;

– in Case C-790/21 P, order Covestro to pay the costs incurred before the Court of Justice and the General Court; and

– in Case C-791/21 P, order the Federal Republic of Germany to pay the costs incurred before the Court of Justice and order Covestro to pay the costs incurred before the General Court.

39 Covestro and the Federal Republic of Germany contend that the cross-appeals should be dismissed and that the Commission should be ordered to pay the costs.

40 By decision of the President of the Court of 18 April 2023, Cases C-790/21 P and C-791/21 P were joined for the purposes of the oral procedure and the judgment.

The request that the oral part of the procedure in Case C-790/21 P be reopened

41 By document lodged at the Court Registry on 1 February 2024, Covestro requested that the Court order the reopening of the oral part of the procedure, pursuant to Article 83 of the Rules of Procedure of the Court of Justice.

42 In support of that request, Covestro claims, in the first place, that, in her Opinion, the Advocate General failed to take due account of a decisive argument put forward by Covestro for the purpose of demonstrating the absence of a compulsory charge in the present case.

43 In the second place, Covestro submits that paragraph 61 of the judgment of the General Court of 24 January 2024, *Germany* v *Commission* (T-409/21, EU:T:2024:34), by which the General Court held that 'the network operators are not required by law to pass on the … surcharge [at issue in the case which gave rise to that judgment] to their customers, so that that surcharge cannot be characterised as a mandatory surcharge', constitutes a new and decisive fact for the purposes of the present proceedings.

44 In that regard, in accordance with Article 83 of its Rules of Procedure, the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not yet been debated between the parties.

45 In the first place, as regards the Advocate General's alleged failure to take account of a decisive argument, it should be borne in mind that the Statute of the Court of Justice of the European Union and the Rules of Procedure of the Court of Justice make no provision for the parties to submit observations in response to the Advocate General's Opinion. Under the second paragraph of Article 252 TFEU, the Advocate General, acting with complete impartiality and independence, is to make, in open court, reasoned submissions on cases which require his or her involvement. The Court is not bound either by the Advocate General's Opinion or by the reasoning which led to that Opinion. Consequently, a party's disagreement with the Advocate General's Opinion, irrespective of the questions that he or she examines in his or her Opinion, cannot in itself constitute grounds justifying the reopening of the oral part of the procedure (see, to that effect, judgments of 13 July 2023, *Grupa Azoty and Others* v *Commission*, C-73/22 P and C-77/22 P, EU:C:2023:570, paragraph 25 and the case-law cited, and of 8 February 2024, *Pilatus Bank* v *ECB*, C-256/22 P, EU:C:2024:125, paragraphs 29 and 30 and the case-law cited).

46 In the second place, as regards the reliance on the judgment of the General Court of 24 January 2024, *Germany* v *Commission* (T-409/21, EU:T:2024:34), it must be stated that a judgment delivered by the General Court cannot bind the Court of Justice (see, to that effect, judgment of 4 December 2019, *Polskie Górnictwo Naftowe i Gazownictwo* v *Commission*, C-342/18 P, EU:C:2019:1043, paragraph 60).

47 In those circumstances, the Court considers, after hearing the Advocate General, that there is no need to order the reopening of the oral part of the procedure.

The cross-appeals

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

49 In support of its cross-appeals, the Commission puts forward three grounds of appeal.

The first ground of appeal

Arguments of the parties

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

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

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

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

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

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

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

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

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

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

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

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

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

62 The Federal Republic of Germany contends that the first ground of appeal is unfounded. Covestro contends that that ground of appeal should be rejected as inadmissible in so far as it relies on arguments based on case-law precedents which the Commission did not put forward before the General Court, and as unfounded as to the remainder.

Findings of the Court

– *Admissibility of the first ground of appeal*

63 It is clear from settled case-law that, while it is true that the Court of Justice, whose jurisdiction in appeals is limited, may not be seised of a case of wider ambit than that which came before the General Court (judgment of 1 June 1994, *Commission* v *Brazzelli Lualdi and Others*, C-136/92 P, EU:C:1994:211, paragraph 59), the fact remains that an appellant is entitled to lodge an appeal relying, before the Court, on grounds which arise from the judgment under appeal itself and seek to criticise, in law, its correctness (judgments of 29 November 2007, *Stadtwerke Schwäbisch Hall and Others* v *Commission*, C-176/06 P, EU:C:2007:730, paragraph 17, and of 26 February 2020, *EEAS* v *Alba Aguilera and Others*, C-427/18 P, EU:C:2020:109, paragraph 54).

64 By the first ground of its cross-appeals, the Commission challenges the General Court's assessment of the plea of inadmissibility which it raised before that court, and which alleged that the action brought by Covestro was out of time. The reliance, in that context, on case-law precedents to which it did not refer before the General Court may thus be regarded merely as amplifying its arguments and, accordingly, must be declared admissible (see, by analogy,

judgments of 19 May 1983, *Verros* v *Parliament*, 306/81, EU:C:1983:143, paragraph 9; of 26 April 2007, *Alcon* v *OHIM*, C-412/05 P, EU:C:2007:252, paragraph 40; and of 5 March 2024, *Kočner* v *Europol*, C-755/21 P, EU:C:2024:202, paragraph 41).

65 It follows that, contrary to what Covestro contends, the present ground of appeal is admissible in its entirety.

– *Substance of the first ground of appeal*

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

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

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

69 In support of that consideration, the General Court observed, in paragraph 38 of that judgment, that the criterion of the date on which the measure came to the knowledge of the applicant as the starting point of that time limit is subsidiary to the criteria of publication or notification of the measure. While pointing out that publication was not a precondition for the decision at issue to come into effect, it found, in paragraph 39 of the judgment under appeal, that that decision had to be published in the Official Journal in accordance with Article 32(3) of Regulation 2015/1589, such that Covestro could legitimately expect that decision to be published.

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

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

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

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

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

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

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

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

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

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

80 The precedents cited in paragraph 78 of the present judgment cannot be read in isolation, but form part of the case-law of the Court which has interpreted broadly the concept of 'publication' within the meaning of the sixth paragraph of Article 263 TFEU. Thus, in addition to the situation referred to in paragraph 78 above, that concept covers publication of the measure being contested in the Official Journal which is based not on an obligation imposed by the Treaty, but on the established practice of the EU institutions (see, to that effect, judgment of 10 March 1998,

Germany v *Council*, C-122/95, EU:C:1998:94, paragraphs 36 and 39) or on a provision of secondary legislation, such as Article 32(3) of Regulation 2015/1589 (see, to that effect, order of 25 November 2008, *S.A.BA.R.* v *Commission*, C-501/07 P, EU:C:2008:652, paragraph 23); it also covers publication on the website of an EU institution, body, office or agency where such publication is provided for under secondary legislation (see, to that effect, judgment of 26 September 2013, *PPG and SNF* v *ECHA*, C-625/11 P, EU:C:2013:594, paragraphs 30 to 32).

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

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

83 In addition, that explains why, in the general scheme of the sixth paragraph of Article 263 TFEU and in the interests of legal certainty, the date of publication takes precedence over the date on which the measure came to the knowledge of the person concerned, which, as has been recalled in paragraph 73 of the present judgment, is a subsidiary criterion in terms of when the time limit for bringing proceedings starts to run. It is therefore not possible to accept the Commission's argument when, in actual fact, it suggests reversing the relationship between those two criteria referred to in the sixth paragraph of Article 263 TFEU.

84 Moreover, contrary to the Commission's assertions, the interpretation adopted in paragraphs 76 and 80 of the present judgment is also such as to avoid any discrimination or arbitrary treatment in the administration of justice and thus to ensure equality of arms between beneficiaries of State aid and competing undertakings. For all those interested parties, the time limit for bringing proceedings starts to run from the same date, namely the date on which the decision was published in the Official Journal. Furthermore, inasmuch as the Commission is the author of such a decision and is responsible for its publication in the Official Journal, it cannot validly put forward an argument alleging inequality of arms to its detriment.

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

Section 5 of that chapter, which is devoted to the Court of Justice of the European Union, the second provision comes under Chapter 2 of that title, which deals with the legal acts of the European Union and their adoption procedures.

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

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

The second ground of appeal

Arguments of the parties

88 By the second ground of appeal put forward in support of its cross-appeals, the Commission alleges that the General Court made two errors of law in paragraphs 37 and 42 of the judgment under appeal, respectively.

89 It submits that, in the first place, paragraph 37 of that judgment contains a manifest distortion of the application. The Commission claims that, contrary to what the General Court found in that paragraph, the action was not lodged within a period of two months and 10 days from the publication, on 16 January 2019, of the decision at issue in the Official Journal, but rather on 20 December 2018, that is to say, approximately one month prior to the publication of that decision.

90 It maintains, in the second place, that by stating, in paragraph 42 of the judgment under appeal, that 'it has not been demonstrated that[,] in the present case[,] … [Covestro] had taken "due cognisance" of the … decision [at issue]' prior to the publication of that decision, the General Court distorted the facts and evidence. It argues that it is clear, in the light of the evidence put forward by the Commission before the General Court, that the existence of the decision at issue had come to Covestro's knowledge prior to its publication in the Official Journal, at the latest by 20 September 2018.

91 The Federal Republic of Germany contends that the second ground of appeal is unfounded. Covestro contends that that ground of appeal is inadmissible and, in any event, unfounded.

Findings of the Court

92 In the first place, as regards the alleged error of law vitiating paragraph 37 of the judgment under appeal, it must be pointed out that the General Court found, in that paragraph, that '[Covestro's] action was lodged within a period of two months and 10 days from the publication of the … decision [at issue] in the Official Journal, which took place on 16 January 2019'.

93 It should be noted, as the Commission did, that that action was admittedly brought on 20 December 2018, that is to say, even before the decision at issue was published in the Official Journal. However, that fact has no bearing whatsoever on the admissibility of that action or, in particular, on the question whether the time limit for bringing proceedings was observed.

94 It is apparent from the case-law that the fact that the time limit for bringing proceedings against a measure such as the decision at issue starts to run, in accordance with the sixth paragraph of Article 263 TFEU, only upon its publication does not mean that an applicant cannot challenge a measure adopted by the European Union prior to its publication (see, to that effect, judgment of 26 September 2013, *PPG and SNF* v *ECHA*, C-626/11 P, EU:C:2013:595, paragraphs 34 to 38).

95 Accordingly, the argument alleging an error of law vitiating paragraph 37 of the judgment under appeal must be rejected as unfounded.

96 In the second place, as regards the alleged error of law vitiating paragraph 42 of the judgment under appeal, it must be pointed out that, in that paragraph, the General Court observed, inter alia, that, 'in any event[,] it has not been demonstrated that[,] in the present case[,] … [Covestro] had taken "due cognisance" of the … decision [at issue]'.

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

98 Accordingly, the argument alleging an error of law vitiating paragraph 42 of the judgment under appeal must be rejected as ineffective.

99 It follows from the foregoing that the second ground of appeal put forward in support of the cross-appeals must be rejected in its entirety, without there being any need to rule on its admissibility.

The third ground of appeal

100 By the third ground of appeal put forward, in the alternative, in support of its cross-appeals, the Commission submits that the General Court infringed Article 89(1) of its Rules of Procedure by failing to ask Covestro to produce documents indicating the precise point in time at which the content of the decision at issue came to Covestro's knowledge.

101 In that regard, it is sufficient to note that the present ground of appeal is based on the premiss that the General Court erred in law in taking as the starting point of the time limit for bringing the action for annulment not the date on which the decision at issue came to Covestro's knowledge, but rather the date on which that decision was published in the Official Journal. That premiss is incorrect, as is apparent from the assessment of the first ground of appeal put forward in support of the cross-appeals.

102 It follows that the third ground of appeal put forward in support of the cross-appeals and, accordingly, those cross-appeals, must be dismissed in their entirety.

The main appeals

103 In support of its appeal in Case C-790/21 P, Covestro relies, formally, on four grounds of appeal. However, it addresses those which it refers to as the first two grounds of appeal together, and makes no distinction between them. It must therefore be held that Covestro puts forward, in essence, three grounds of appeal. The first ground of appeal, which is divided into four parts, alleges infringement of the right to be heard and of the obligation to state reasons. The second ground of appeal, which can be divided into two parts, alleges infringement of Article 107(1) TFEU. The third ground of appeal alleges breach of the principle of non-discrimination.

104 In support of its appeal in Case C-791/21 P, the Federal Republic of Germany, supported by Covestro, puts forward a single ground of appeal, alleging infringement of Article 107(1) TFEU. That ground of appeal is essentially the same as the second part of the second ground of appeal put forward by Covestro, supported by the Federal Republic of Germany, in support of its appeal in Case C-790/21 P.

First ground of appeal in Case C-790/21 P

Arguments of the parties

105 By the first ground put forward in support of its appeal, Covestro submits that the General Court infringed its right to be heard, the obligation to state reasons for the judgment under appeal, Article 47 of the Charter of Fundamental Rights of the European Union and the first sentence of Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950.

106 That ground of appeal is divided into four parts.

107 By the first part, Covestro complains that the General Court infringed its obligation to state reasons and Covestro's right to be heard by making the manifestly incorrect finding, in paragraph 8 of the judgment under appeal, that the network charge applicable to non-peak consumers was calculated according to the physical path methodology. It submits that, contrary to what the General Court stated in that paragraph, and as Covestro maintained at first instance, the 2005 StromNEV Regulation never provided, in respect of non-peak consumers, for a calculation of the charge based on the physical path methodology. It argues that, had the General Court taken into account that argument put forward by Covestro, it would not have relied solely on the individual network charge provided for in the first sentence of Paragraph 19(2) of the 2005 StromNEV Regulation in order to determine the relevant legal framework.

108 By the second part, Covestro complains that the General Court failed to take into account, in paragraphs 12, 94, 103, 129, 135 and 146 of the judgment under appeal, its line of argument relating to the determination of the amount of the surcharge at issue. It submits that, by incorrectly assuming that that amount was calculated and set in respect of 2012 by the 2011 BNetzA decision, the General Court erred in concluding, in paragraph 134 of that judgment, that there was State control over that surcharge. According to Covestro, it is the network operators that have discretion in calculating and fixing that surcharge, which is not subject to any State control or State regulation.

109 By the third part, Covestro complains that the General Court failed to take into account, in paragraphs 130 and 143 of the judgment under appeal, its line of argument relating to the absence of reimbursement of all the losses in revenue and all the costs associated with the exemption at issue. It submits that, in so doing, the General Court infringed its obligation to state reasons and Covestro's right to be heard. It maintains that, if the General Court had taken that line of argument into account, it would have had to conclude that the surcharge at issue did not constitute a charge.

110 By the fourth part, Covestro complains that the General Court failed to take into account, in paragraphs 107 and 125 of the judgment under appeal, its line of argument relating to the invalidity of the 2011 BNetzA decision. It submits that, in holding that that decision was actually applied and that it was liable to have an impact as long as it was not repealed or as long as its unlawfulness was not established, the General Court relied on a misreading of national law. According to Covestro, since that decision had been annulled with retroactive effect from 1 January 2012, it was void *ab initio*.

111 The Commission contends that the first ground of appeal should be rejected as, in part, unfounded and, in part, ineffective.

Findings of the Court

112 By its first ground of appeal, Covestro complains, in essence, that the General Court infringed its right to be heard and the obligation to state reasons for the judgment under appeal by failing to take due account of a number of arguments which Covestro had put forward. It submits that those failures also led to incorrect assessments of German law and of the surcharge at issue.

113 In that regard, in the first place, it should be recalled that the General Court's obligation to state reasons under Article 36 of the Statute of the Court of Justice of the European Union, read in conjunction with the first paragraph of Article 53 thereof, requires that court to disclose clearly and unequivocally its reasoning in such a way as to enable the persons concerned to ascertain the reasons for the decision taken and the Court of Justice to exercise its power of review (judgment of 14 October 2010, *Deutsche Telekom* v *Commission*, C-280/08 P, EU:C:2010:603, paragraphs 135 and 136 and the case-law cited).

114 However, that obligation does not require the General Court to provide an account that follows exhaustively and one by one all the arguments articulated by the parties to the case. The reasoning may therefore be implicit, on condition that it enables the persons concerned to understand the grounds of the General Court's judgment and provides the Court of Justice with sufficient information to exercise its powers of review on appeal (judgment of 30 November 2016, *Commission* v *France and Orange*, C-486/15 P, EU:C:2016:912, paragraph 80 and the case-law cited).

115 In the present case, as regards the first part of the present ground of appeal, it should be noted that paragraph 8 of the judgment under appeal is set out not in the grounds on the basis of which the General Court ruled on the pleas and arguments of the parties, but in the account of the factual background to the dispute. In so far as Covestro claims that the statement contained in that paragraph fails to take into account the arguments which it put forward in paragraphs 29 to 33 of its reply at first instance, it should be noted that those arguments were put forward in the context

of the fourth plea for annulment raised before the General Court. The General Court examined them in paragraphs 194 to 210 of the judgment under appeal, which are not contested in the context of the present ground of appeal.

116 As regards the second to fourth parts of the present ground of appeal, it must be observed that, in paragraphs 84 to 148 of the judgment under appeal, the General Court examined and rejected, in a reasoned manner, the second part of the second plea in law raised by Covestro at first instance, which alleged that there was no aid granted through State resources. In that context, the General Court expressly ruled on a number of arguments put forward by Covestro and, inter alia, rejected, in paragraphs 107 and 125 of the judgment under appeal, its argument relating to the invalidity of the 2011 BNetzA decision; rejected, in paragraph 130 of that judgment, its argument that losses were not fully offset; and rejected, in paragraph 135 of that judgment, its argument relating to the determination of the amount of the surcharge at issue.

117 It follows that, contrary to what Covestro submits, the General Court did not infringe its obligation to state reasons by failing to take due account of those arguments. Since Covestro's allegation that its right to be heard was infringed is based on the premiss that the General Court failed to take its arguments into account, it must also be rejected.

118 Moreover, in so far as Covestro appears, under the guise of an alleged infringement of the obligation to state reasons, to maintain that the General Court should have upheld those arguments, it must be stated that this is a question which is distinct from that relating to infringement of the obligation to state reasons and which concerns whether the reasoning is well founded (see, by analogy, judgment of 30 November 2016, *Commission* v *France and Orange*, C-486/15 P, EU:C:2016:912, paragraph 79).

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

120 Accordingly, with respect to the assessment in the context of an appeal of the General Court's findings on national law, which, in the field of State aid, constitute findings of fact, the Court of Justice has jurisdiction only to determine whether there was a distortion of that law (judgments of 3 April 2014, *France* v *Commission*, C-559/12 P, EU:C:2014:217, paragraph 79, and of 14 December 2023, *Commission* v *Amazon.com and Others*, C-457/21 P, EU:C:2023:985, paragraph 20 and the case-law cited). A distortion must be obvious from the documents in the Court's file, without there being any need to carry out a new assessment of the facts and the evidence (judgment of 3 April 2014, *France* v *Commission*, C-559/12 P, EU:C:2014:217, paragraph 80).

121 In the present case, first, it is true that, as the Commission moreover acknowledges, the General Court's presentation of German law in paragraph 8 of the judgment under appeal is imprecise. Contrary to what that paragraph may suggest, only the individual charges for baseload consumers, and not those applicable to non-peak consumers, were calculated according to the

physical path methodology before the exemption at issue was introduced. However, Covestro has failed to demonstrate, in the context of the present ground of appeal, that that lack of precision, at the stage of setting out the background to the dispute, had a bearing on the General Court's assessment of the merits of the action at first instance.

122 Second, as to the remainder, the Court finds that Covestro has neither demonstrated nor even alleged any distortion of national law or of the facts.

123 In the third place, since the argument that the 2011 BNetzA decision produced no effects is the same as a line of argument put forward by Covestro in the context of the third complaint in the second part of its second ground of appeal, it will be examined in that context.

124 In the light of all the foregoing considerations, and subject to the reservation expressed in the preceding paragraph, the first ground of appeal put forward in Case C-790/21 P must be rejected as, in part, ineffective and, in part, unfounded.

The first part of the second ground of appeal in Case C-790/21 P

Arguments of the parties

125 By the first part of the second ground put forward in support of its appeal, Covestro submits that the judgment under appeal is vitiated by an error of law in that the General Court incorrectly held, in paragraphs 47 to 77 of that judgment, that the exemption at issue constitutes an 'advantage' for the purposes of Article 107(1) TFEU. It maintains that, in so doing, the General Court excessively extended the concept of 'State aid' within the meaning of that provision.

126 In particular, Covestro argues that the examination, in paragraph 56 et seq. of the judgment under appeal, of the exemption at issue in the light of the private operator in a market economy test is incorrect. It asserts that the General Court should have assessed the exemption at issue by taking into account Covestro's contribution to the stability of the network in Germany and the costs avoided as a result of that contribution. Moreover, the General Court acknowledged, in paragraph 208 of that judgment, that Covestro's arguments in this respect were well founded.

127 Covestro submits that, in any event, even if the exemption at issue were to be regarded as constituting an advantage, it is not selective. First, it maintains that that exemption is a measure capable, in principle, of benefiting, without restriction, all national undertakings depending on their purchasing behaviour on the upstream electricity network. Second, it argues that a distinction limiting the scope of that exemption to baseload consumers is justified by objective criteria based on weighing up the principle that network charges reflect the costs of the network against the contribution of undertakings to the stability of that network.

128 The Commission contends that the present part of the ground of appeal should be rejected as inadmissible and, in any event, as unfounded.

Findings of the Court

129 In the first place, the arguments relating to the absence of an 'advantage', for the purposes of Article 107(1) TFEU, seek, in essence, to challenge the findings of fact made by the General Court, without establishing or even alleging any distortion of the facts or evidence by that court.

130 In accordance with the case-law cited in paragraph 119 of the present judgment, save where there is a distortion of the facts or evidence, such findings are not subject to review by the Court of Justice on appeal.

131 In so far as Covestro appears to allege, in that context, a contradiction in reasoning between the General Court's findings relating to the concept of 'advantage' and paragraph 208 of the judgment under appeal, it is sufficient to observe that that allegation is imprecise and insufficiently substantiated.

132 Accordingly, all the arguments relating to the existence of an advantage are inadmissible.

133 In the second place, as regards the arguments relating to selectiveness, it must be pointed out that, in paragraph 194 of the judgment under appeal, which is not contested in the appeal in Case C-790/21 P, the General Court found that Covestro had not challenged the Commission's assessment, set out in recitals 101 to 121 of the decision at issue, concerning the selective nature of the measure in question.

134 This is therefore a new line of argument, put forward for the first time before the Court of Justice, which must, in accordance with the case-law cited in paragraph 63 of the present judgment, be declared inadmissible.

135 Accordingly, the first part of the second ground of appeal put forward in Case C-790/21 P must be rejected as inadmissible in its entirety.

The second part of the second ground of appeal in Case C-790/21 P and the single ground of appeal in Case C-791/21 P

136 By the second part of the second ground put forward in support of the appeal in Case C-790/21 P and by the single ground put forward in support of the appeal in Case C-791/21 P, respectively, Covestro and the Federal Republic of Germany claim that the General Court infringed Article 107(1) TFEU inasmuch as it erred in holding that the exemption at issue constitutes aid granted through 'State resources' within the meaning of that provision.

137 Their arguments concern, in essence, three questions relating to (i) the legal test for assessing whether a measure granted through 'State resources' exists; (ii) the existence of a compulsory charge, and (iii) State control.

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

– *Arguments of the parties*

138 Covestro, by the first two complaints in the second part of its second ground of appeal, and the Federal Republic of Germany, by the first part of its single ground of appeal, claim, in essence, that the General Court applied an incorrect legal test in order to assess whether the resources at issue were State resources.

139 In the first place, in their written pleadings lodged before the Court of Justice, Covestro and the Federal Republic of Germany contested, respectively, paragraphs 84 to 97 and paragraphs 95 to 97 and 109 of the judgment under appeal on the ground that the General Court erred in holding that, for the purpose of determining whether or not resources are State resources, the existence of a compulsory charge on end consumers or customers and State control over the funds or the administrators of those funds are two factors which 'together form an alternative', with the result that it was sufficient for that court to ascertain whether the surcharge at issue was a compulsory charge which could be treated in the same way as a parafiscal charge. They submit that, on the contrary, these are cumulative criteria, as is apparent from the case-law arising, inter alia, from the judgments of 17 July 2008, *Essent Netwerk Noord and Others* (C-206/06, EU:C:2008:413, paragraphs 66, 69, 70, 72 and 75); of 28 March 2019, *Germany* v *Commission* (C-405/16 P, EU:C:2019:268, paragraph 72); of 15 May 2019, *Achema and Others* (C-706/17, EU:C:2019:407); and of 16 September 2021, *FVE Holýšov I and Others* v *Commission* (C-850/19 P, EU:C:2021:740).

140 In addition, according to the Federal Republic of Germany, that interpretation by the General Court, based on alternative criteria, contradicts paragraphs 133 to 145 of the judgment under appeal, in which the General Court assessed whether State control existed, even though it had already concluded that a compulsory charge existed.

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

142 In that regard, Covestro submits that, in paragraph 121 of the judgment under appeal, the General Court incorrectly concluded that the surcharge at issue corresponded to the concept of a 'charge' for the purposes of Articles 30 and 110 TFEU. It maintains that that surcharge does not fulfil the criteria resulting from the case-law of the Court of Justice relating to that concept. It argues that the surcharge at issue differs from the surcharges that were at issue in the cases giving rise to that case-law.

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

144 The Commission disputes the merits of the first and second complaints in the second part of the second ground of appeal put forward by Covestro and contends that the first part of the single ground of appeal put forward by the Federal Republic of Germany is, as such, ineffective.

– *Findings of the Court*

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

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

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

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

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

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

151 The criteria referred to in paragraphs 149 and 150 of the present judgment constitute alternative criteria for establishing that a measure is granted 'through State resources' within the meaning of Article 107(1) TFEU (see, to that effect, judgment of 12 January 2023, *DOBELES HES*, C-702/20 and C-17/21, EU:C:2023:1, paragraph 42), as Covestro and the Federal Republic of Germany acknowledged at the hearing in response to a question from the Court regarding the scope of the judgment of 12 January 2023, *DOBELES HES* (C-702/20 and C-17/21, EU:C:2023:1).

152 It follows, first, that the General Court did not err in law when, in paragraphs 95 to 97 and 109 of the judgment under appeal, it held that the nature of the resources as State resources, for the purposes of Article 107(1) TFEU, may be established by means of two alternative conditions, one relating to the existence of a compulsory charge on end consumers or customers and the other to State control over the administration of the scheme and, in particular, over funds or the administrators of those funds. In the light of the replies given by Covestro and the Federal Republic of Germany at the hearing, all the arguments challenging that assessment must be rejected.

153 Second, contrary to what the Federal Republic of Germany claims, the General Court cannot be criticised for having considered it appropriate to examine, in paragraphs 133 to 145 of the judgment under appeal, whether there was State control over the funds collected by way of the surcharge at issue or over the network operators, after having found, in paragraph 132 of that judgment, that there was a parafiscal charge or a compulsory charge involving the use of State resources.

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

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

156 As is apparent from paragraph 149 of the present judgment, it is not the funds financed by any charge but only those that are financed by a compulsory charge, provided for under national legislation, and managed and apportioned in accordance with that legislation, which are capable of constituting 'State resources' within the meaning of that provision. Moreover, as is apparent from paragraphs 109 and 113 of the judgment under appeal, the General Court specifically sought to determine whether the surcharge at issue was imposed by the State and was passed on entirely, under a legal obligation, to the persons ultimately liable for payment of that surcharge.

157 Fourth, as regards the line of argument put forward by Covestro and by the Federal Republic of Germany concerning Articles 30 and 110 TFEU, it must be stated that, in paragraph 121 of the judgment under appeal, the General Court, in a ground included purely for the sake of completeness which is introduced by the adverbial phrase 'furthermore', took into account the case-law relating to those provisions. It inferred from this that the identity of the person liable for payment of the charge is of little account in so far as the charge relates to the product in question or to a necessary activity in connection with that product. It added that the decisive factor is therefore that the undertakings which levied the charge are not merely bound by an obligation to purchase by means of their own financial resources, but are appointed by the State to administer a State resource.

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

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

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

The existence of a compulsory charge

– *Arguments of the parties*

161 Covestro, by the third complaint in the second part of its second ground of appeal, and the Federal Republic of Germany, by the second part of its single ground of appeal, submit, in essence, that, in paragraphs 99 and 106 to 148 of the judgment under appeal, the General Court misapplied Article 107(1) TFEU by classifying the surcharge at issue as a parafiscal charge or as a compulsory charge.

162 Covestro submits, first, that the General Court failed to have regard to national law in incorrectly finding that the network operators were under an obligation to collect the surcharge at issue. To that end, the General Court erred in relying solely on the 2011 BNetzA decision. It maintains that that decision, however, was declared by the German courts to be not only unlawful, but void *ab initio*, with the result that, contrary to what the General Court held in paragraph 107 of the judgment under appeal, that decision could not have had any impact. According to Covestro, it was necessary to assess the operation of the mechanism for the surcharge at issue in the light of the 2013 StromNEV Regulation, applicable with retroactive effect from 1 January 2012 following the annulment of the seventh sentence of Paragraph 19(2) of the 2011 StromNEV Regulation. It submits that those regulations neither imposed any obligation on network operators to collect the surcharge at issue nor empowered the BNetzA to impose such an obligation on those operators. It argues, furthermore, that the judgment of 6 October 2015 of the Bundesgerichtshof (Federal Court of Justice), on which the General Court relied in paragraph 120 of the judgment under appeal, does not set out any such obligation.

163 Second, Covestro claims that national law does not impose any obligation to pay the surcharge at issue either on the part of the network users, which the General Court incorrectly described as 'end users', or on the part of the end users in the strict sense. It submits that, even if the 2011 BNetzA decision imposed an obligation on network operators to collect that surcharge, such an obligation could not suffice, contrary to what the General Court held in paragraphs 120, 123 and 125 of the judgment under appeal, for the purpose of symmetrically requiring the network users to pay the surcharge. It maintains that a payment obligation could have been provided for only under a contractual agreement, negotiated on a case-by-case basis, given that, in respect of 2012 and 2013, there was no statutory limitation period relating to the adoption or content of a contractual obligation to pass the surcharge at issue on to the network users. Covestro argues that, in reality, it was for each electricity supplier, as a network user, to decide to pass the surcharge at issue on to the end users, a fact which the General Court failed to examine. It claims that, even if all the suppliers had decided to pass that surcharge on systematically to the end users, such a practice would be insufficient to conclude that there was a legal obligation.

164 Third, Covestro submits that, contrary to what the General Court stated in paragraphs 126 to 130 of the judgment under appeal, the network operators were not fully compensated for the losses in revenue and for the costs generated by the exemption at issue. In particular, it maintains that, in the event of the insolvency of a baseload consumer which benefited from that exemption even

though the conditions were not satisfied, both the 2011 BNetzA decision and the applicable legal framework precluded compensation for losses relating to the network operator's claims against such a consumer.

165 Similarly, the Federal Republic of Germany submits that, inter alia in paragraphs 110, 118, 119 and 121 of the judgment under appeal, the General Court erred in holding that the relationship between the supplier and the end user of electricity was not decisive for the purpose of concluding that there was a compulsory charge, on the incorrect ground that the surcharge at issue is collected not for the consumption of electricity, but for the use of the network. Moreover, it maintains that, in paragraphs 120 and 122 to 125 of that judgment, the General Court erred in referring, without stating any reasons, to the obligation to collect and, on that basis, incorrectly inferred an obligation to pay the surcharge at issue provided for under national law. In the absence of any legal obligation to pay that surcharge, it could have been collected only on the basis of the rules of civil law. It argues that the reasoning used by the General Court to arrive at that finding and that inference is contrary to the case-law of the Court of Justice.

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

– *Findings of the Court*

167 It is apparent from the case-law cited in paragraph 149 of the present judgment that funds financed by a charge or other compulsory surcharges under national legislation and managed and apportioned in accordance with that legislation constitute 'State resources' within the meaning of Article 107(1) TFEU.

168 In the present case, after assessing, in paragraphs 110 to 131 of the judgment under appeal, the surcharge at issue, the General Court concluded, in paragraph 132 of that judgment, that that surcharge involved the use of State resources. In support of that conclusion, it observed that the 2011 BNetzA decision imposed on distribution system operators an obligation to collect the surcharge at issue from the network users and to transfer the corresponding proceeds to the transmission system operators. It also considered that the mechanism of that surcharge fully compensated network operators for their losses in revenue stemming from the exemption at issue, since the amount of that surcharge was adjusted to meet the financial needs triggered by that exemption. It also pointed out that that amount was determined according to a methodology set by the 2011 BNetzA decision, while noting that, in respect of 2012, that decision set the initial amount of the abovementioned surcharge.

169 Covestro and the Federal Republic of Germany dispute those assessments with three sets of arguments.

170 In the first place, Covestro criticises the General Court for having inferred the obligation to collect the surcharge at issue from the 2011 BNetzA decision, even though that decision was declared null and void by the German courts and the legislative framework did not allow the BNetzA to impose such an obligation.

171 In that regard, apart from the fact that, as is apparent from paragraphs 107 and 125 of the judgment under appeal, those arguments were put forward out of time before the General Court, the Court finds that they cannot succeed.

172 Neither the potential unlawfulness of an aid scheme, inter alia under national law, nor the annulment of that scheme can negate its classification as 'State aid' in so far as, notwithstanding such unlawfulness or annulment, such a scheme has produced effects in practice (see, to that effect, judgments of 3 March 2005, *Heiser*, C-172/03, EU:C:2005:130, paragraph 38, and of 21 December 2016, *Commission* v *Aer Lingus and Ryanair Designated Activity*, C-164/15 P and C-165/15 P, EU:C:2016:990, paragraph 69), as the General Court, in essence, correctly held in paragraphs 107 and 125 of the judgment under appeal. Moreover, as the General Court also correctly observed in paragraph 107 of that judgment, the effectiveness of the rules on State aid would be considerably weakened if their application could be excluded merely because an aid measure, which had in practice been applied, was subsequently declared void *ab initio*. Thus, it is immaterial, in that regard, that the potential annulment of the aid scheme is retroactive, since, for a certain period of time, the scheme was actually applied in practice (see, by analogy, judgment of 6 November 2012, *Commission* v *Hungary*, C-286/12, EU:C:2012:687, paragraphs 44 and 45).

173 As regards the judgment of 6 October 2015 of the Bundesgerichtshof (Federal Court of Justice), referred to in paragraph 120 of the judgment under appeal, it should be pointed out that the General Court merely noted that that German court held that the surcharge at issue constituted a surcharge that was aimed at covering the financial losses of the network operators. It follows that, in so far as Covestro complains that the General Court incorrectly inferred from that judgment the existence of an obligation to collect the surcharge at issue, its argument is based on a misreading of the judgment under appeal.

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

175 First, as regards the identification of the persons ultimately liable for payment of the surcharge at issue, the General Court held, in paragraph 118 of the judgment under appeal, that that surcharge concerned only the relationship between the network operators and the network users, since that surcharge is collected not for the consumption of electricity, but for the use of the network. It concluded on that basis, in paragraph 119 of that judgment, that the question as to whether the electricity suppliers were obliged in turn to pass that surcharge on to the end users of electricity was irrelevant. In its view, the persons ultimately liable for payment of the surcharge were the network users, that is to say, the suppliers themselves and the end users directly connected to the network, and not the other end users.

176 In that regard, the consideration that the surcharge at issue is collected for the use of the network and the consideration that the network users must be regarded as end users are matters of factual appraisal. In accordance with the case-law referred to in paragraph 119 of the present judgment, it is not for the Court of Justice to review such an appraisal, in the absence of any allegation of distortion.

177 Second, as regards the existence of an obligation to pay on the part of the network users, it is apparent from paragraphs 120 and 122 to 124 of the judgment under appeal that the General Court endorsed the Commission's findings that the 2011 BNetzA decision imposed on distribution system operators an obligation to collect the surcharge at issue and to pass it on, and

that that decision provided that the proceeds from that surcharge must be transferred to the various transmission system operators on a monthly basis. The General Court concluded therefrom that the surcharge at issue, introduced by an administrative authority through a regulatory measure, was binding on the network users.

178 According to the Court's case-law clarifying the criterion referred to in paragraphs 149 and 167 of the present judgment, amounts resulting from the price surcharge imposed by the State on purchasers of electricity are similar to a charge which is levied on electricity and have their origin in 'State resources' within the meaning of Article 107(1) TFEU. In order to be regarded as such, the funds must derive from compulsory contributions imposed by the legislation of the Member State concerned and must be managed and apportioned in accordance with that legislation, irrespective of whether the financing mechanism falls, strictly speaking, within the category of fiscal surcharges under national law. By contrast, it is not sufficient that the network operators pass on in the electricity sale price to their end customers the additional costs caused by their obligation to purchase electricity generated from certain energy sources at the statutory rates, where that offsetting is the result not of a legal obligation, but only of a practice. In such a case, the surcharge could not be regarded as compulsory (see, to that effect, judgment of 12 January 2023, *DOBELES HES*, C-702/20 and C-17/21, EU:C:2023:1, paragraphs 34 to 37 and the case-law cited).

179 In the present case, it is apparent from the findings of fact made by the General Court, which it is not for the Court of Justice to review, that the 2011 BNetzA decision required the distribution system operators to collect the surcharge at issue from the network users. It is also common ground, in the light of the findings of fact made by the General Court in paragraphs 12, 99 and 129 of the judgment under appeal, which it is not for the Court of Justice to review, that that decision laid down the methodology by which the amount of the surcharge at issue was to be calculated each year by the transmission system operators.

180 In the light of the case-law referred to in paragraph 178 of the present judgment, the Court finds that amounts resulting from a compulsory surcharge which, like the surcharge at issue, is imposed by a regulatory measure identifying the entities – even those which are private – responsible for collecting that surcharge from persons liable for payment that are also identified by that measure and defining the methodology for calculating the amount of that surcharge and its annual adjustment, have their origin in 'State resources' within the meaning of Article 107(1) TFEU. In particular, since that surcharge has its origin in a regulatory measure which requires network operators to collect it, it cannot be asserted that it is the result of a mere practice.

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

182 In the third place, as regards the compensation of the costs generated by the exemption at issue, the General Court, referring to the 2011 BNetzA decision, endorsed, in paragraphs 126, 127 and 130 of the judgment under appeal, the Commission's finding in the decision at issue that the mechanism of the surcharge at issue fully compensated network operators for their losses in revenue stemming from the exemption at issue, since the amount of that surcharge was adjusted to meet the financial needs triggered by that exemption.

183 The finding that the methodology for calculating the amount of the surcharge at issue provided for in the 2011 BNetzA decision was intended to enable all the costs associated with the exemption at issue to be covered constitutes a factual appraisal by the General Court which it is not for the Court of Justice to review at the appeal stage in the absence of any allegation of distortion, in accordance with the case-law referred to in paragraph 119 of the present judgment.

184 Moreover, as regards losses in revenue due to insolvency, the financial effects of which are borne by the distribution system operators, the General Court held, in paragraph 130 of the judgment under appeal, that such a loss does not constitute a loss of revenue for the purposes of the scheme in question and is justified by the fact that the relationships between the network operators and the persons ultimately liable for payment of the surcharge at issue are relationships governed by private law.

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

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

187 In the light of the foregoing, the third complaint in the second part of the second ground of appeal put forward by Covestro and, taking into account the considerations set out in paragraph 124 of the present judgment, the first ground of appeal put forward by that party and the second part of the single ground of appeal put forward by the Federal Republic of Germany must be rejected as unfounded.

State control

– *Arguments of the parties*

188 Covestro, by the fourth complaint in the second part of its second ground of appeal, and the Federal Republic of Germany, by the third part of its single ground of appeal, claim, in essence, that the General Court erred in law in holding that there is State control over the funds arising from the surcharge at issue.

189 The Commission contends that that fourth complaint and that third part are unfounded and, in any event, ineffective.

– *Findings of the Court*

190 As is apparent from the case-law cited in paragraphs 148 to 151 of the present judgment, the existence of a charge or other compulsory surcharges under national legislation and managed and apportioned in accordance with that legislation and the existence of State control over the sums in question constitute two alternative criteria for identifying 'State resources' within the meaning of Article 107(1) TFEU.

191 In the present case, the General Court found, in paragraph 132 of the judgment under appeal, that the surcharge at issue constituted a parafiscal charge or a compulsory charge involving the use of 'State resources' within the meaning of that case-law. As is apparent from paragraphs 167 to 187 of the present judgment, Covestro and the Federal Republic of Germany have not succeeded in demonstrating that that finding of the General Court is vitiated by an error of law.

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

193 Accordingly, the fourth complaint in the second part of the second ground of appeal put forward by Covestro and the third part of the Federal Republic of Germany's single ground of appeal are ineffective.

194 It follows from all of the foregoing that the second part of the second ground put forward in support of the appeal in Case C-790/21 P and the single ground put forward in support of the appeal in Case C-791/21 P must be rejected in their entirety.

Third ground of appeal in Case C-790/21 P

Arguments of the parties

195 By the third ground put forward in support of its appeal in Case C-790/21 P, Covestro claims that the General Court failed to observe the principle of non-discrimination in paragraphs 192 to 210 of the judgment under appeal. It submits that the General Court failed to take account of a difference in treatment resulting from the order for recovery of the aid. It maintains that baseload consumers which, like Covestro, benefited from the exemption at issue were therefore required, as a result of the recovery of aid ordered by the decision at issue, to pay a minimum charge in an amount corresponding to 20% of the published general charges. According to Covestro, by contrast, baseload consumers who fulfilled the criteria for benefiting from the exemption at issue in respect of 2012 and 2013, and who had requested it in due time but had not yet received the final exemption decision on the date on which the 2013 StromNEV Regulation entered into force, were able to benefit from the transitional scheme established by that regulation and were therefore subject to flat-rate charges, which in some circumstances could be lower than that minimum charge.

196 First, Covestro submits that, in paragraph 204 of the judgment under appeal, the General Court incorrectly dismissed the relevance of the transitional scheme in its assessment of whether there was a breach of the principle of non-discrimination. It maintains that, on that basis, the General Court should have assessed the situation prevailing at the time of the adoption of the decision at issue, in other words at the time of the recovery ordered by the Commission, and should have

taken account of changes in the German legal framework. As a result of the order for recovery of the aid, the German authorities were obliged to treat identical situations differently without any objective reason. Furthermore, it argues that the General Court could not disregard the transitional scheme on the ground that that scheme was not notified to the Commission.

197 Second, it submits that the General Court failed to examine whether the unequal treatment within the group of baseload consumers was justified. According to Covestro, those consumers formed a homogeneous group.

198 Third, it submits that, in paragraphs 207 and 210 of the judgment under appeal, the General Court erred in law in holding that non-peak consumers and baseload consumers had different purchasing behaviour, while at the same time stating that the individual charges were, notwithstanding that difference, reasonable. It maintains that that judgment is vitiated by an error of law in that it regards as justified the equal treatment of those two categories of consumers which, however, are in different situations. Moreover, Covestro submits that the judgment under appeal is based on a contradiction inasmuch as the General Court stated, on the one hand, in paragraph 208 of that judgment, that the individual charges calculated according to the physical path methodology could be zero or virtually zero and, on the other, in paragraph 65 of that judgment, that virtually free access to the network is inconceivable. Lastly, it argues that, in paragraph 209 of the judgment under appeal, the General Court erred in holding that the decision to treat non-peak users in the same way as baseload consumers was taken by the German legislature. According to Covestro, that court disregards, in this respect, the fact that the transitional scheme entered into force retroactively.

199 The Commission contends that the third ground of the appeal in Case C-790/21 P is inadmissible and, in any event, unfounded.

Findings of the Court

200 Covestro complains, in essence, that the General Court failed to observe the principle of non-discrimination by rejecting, in paragraphs 192 to 210 of the judgment under appeal, its arguments alleging that the order for recovery of the aid was discriminatory.

201 In the judgment under appeal, the General Court rejected those arguments on one main ground and on grounds included purely for the sake of completeness.

202 First, the General Court rejected them as ineffective, in paragraphs 194 and 195 of that judgment. It observed, to that effect, that Covestro did not dispute the selective, and therefore discriminatory, nature of the exemption at issue and that that undertaking did not explain how the recovery order relating to a measure the discriminatory nature of which it did not dispute could in turn be discriminatory.

203 Second, the General Court rejected those arguments as unfounded in paragraphs 196 to 209 of the judgment under appeal. It is apparent, in that regard, from the use of the wording ‘in any event’, in paragraph 196 of that judgment, that the grounds set out in paragraphs 196 to 209 thereof are grounds included purely for the sake of completeness.

204 By the present ground of appeal, Covestro has not put forward any argument specifically contesting the principal reasoning set out in paragraphs 194 and 195 of the judgment under appeal. All of its arguments seek, in reality, to contest the grounds included purely for the sake of completeness in paragraphs 196 to 209 of that judgment.

205 It follows that, in accordance with the case-law referred to in paragraph 97 of the present judgment, the third ground put forward by Covestro in support of its appeal in Case C-790/21 P must be rejected as ineffective, without it being necessary to rule on its admissibility.

206 Consequently, since all the grounds of appeal put forward in support of the main appeals in Cases C-790/21 P and C-791/21 P have been rejected, those appeals must be dismissed in their entirety.

Costs

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

208 In the present case, Covestro and the Federal Republic of Germany have been unsuccessful in all of their claims concerning, respectively, the main appeal in Case C-790/21 P and the main appeal in Case C-791/21 P, while the Commission has been unsuccessful in all of its claims concerning the cross-appeals in those cases.

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

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

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

2. **Orders Covestro Deutschland AG, the Federal Republic of Germany and the European Commission to bear their own costs.**

[Signatures]