Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber, Extended Composition)

9 June 2021 *

(State aid – Sale of canned beverages in border shops in Germany to foreign residents – Exemption from the deposit on condition that the beverages purchased are consumed outside Germany – Complaint – Decision by the Commission not to raise objections – Action for annulment – *Locus standi* – Admissibility – Conditions for initiating a formal investigation procedure – Error of law – Serious difficulties – Concept of 'State aid' – State resources – Non-imposition of a fine)

In Case T-47/19,

**Dansk Erhverv**, established in Copenhagen (Denmark), represented by T. Mygind and H. Peytz, lawyers,

applicant,

supported by

**Danmarks Naturfredningsforening**, established in Copenhagen, represented by T. Mygind and H. Peytz, lawyers,

intervener,

v

**European Commission**, represented by B. Stromsky and T. Maxian Rusche, acting as Agents,

defendant,

supported by

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

and by

**Interessengemeinschaft der Grenzhändler (IGG)**, established in Flensburg (Germany), represented by M. Bauer and F. von Hammerstein, lawyers,

interveners,

* Language of the case: English.

APPLICATION under Article 263 TFEU for the annulment of Commission Decision C(2018) 6315 final of 4 October 2018 concerning State Aid SA.44865 (2016/FC) – Germany – Alleged State aid to German beverage border shops,

THE GENERAL COURT (Fourth Chamber, Extended Composition),

composed of S. Papasavvas, President, S. Gervasoni (Rapporteur), P. Nihoul, R. Frendo and J. Martín y Pérez de Nanclares, Judges,

Registrar: E. Artemiou, Administrator,

having regard to the written part of the procedure and further to the hearing on 19 November 2020,

gives the following

## Judgment

### I. Background to the dispute

#### A. German deposit scheme for certain non-reusable drinks packaging

1 The Verordnung über die Vermeidung und Verwertung von Verpackungsabfällen (Verpackungsverordnung) (Ordinance on the prevention and recycling of packaging waste) of 21 August 1998 (BGBl. 1998 I, p. 2379 ('VerpackV'), transposes European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste (OJ 1994 L 365, p. 10).

2 Paragraph 9(1) of the VerpackV lays down a deposit scheme for certain non-reusable packaging for beverages ('the deposit scheme'). It provides, inter alia, as follows:

'Distributors who put drinks into circulation in non-reusable drinks packaging with a volume of between 0.1 and 3 litres shall be obliged to charge the purchaser a deposit of at least EUR 0.25 including value added tax per drinks pack. The first sentence above shall not apply to packaging sold to final consumers outside the territorial scope of this Ordinance. The deposit shall be charged by each further distributor at each distribution level until transfer to the final consumer. Distributors shall mark drinks in non-reusable drinks packaging subject to a compulsory deposit pursuant to the first sentence above as being subject to such deposit in a clearly legible way and in a conspicuous place and shall take part in a nation-wide deposit scheme that allows members of the scheme to manage deposit return claims among themselves. The deposit shall be refunded upon return of the packaging Deposits shall not be refunded without packaging being returned. …'

3 The deposit must therefore be charged at each distribution level until transfer to the end-consumer and refunded upon return of the packaging.

4 Under Paragraph 15(1)(14) of the VerpackV, failure to collect the deposit in breach of Paragraph 9(1) constitutes an administrative offence. Paragraph 69(3) of the Gesetz zur Neuordnung des Kreislaufwirtschafts und Abfallrechts (act recasting the law on life-cycle and waste management), of 24 February 2012 (BGBI. 2012 I, p. 212, ('the Life-Cycle Management Act'), provides that that type of offence may be punished by a fine of up to EUR 100 000.

5 The deposit scheme came into effect on 1 January 2003.

6 In 2005, the German retail and beverage sectors set up Deutsche Pfandsystem GmbH ('DPG'). DPG sets the legal and organisational framework for a deposit clearing system between the distributors taking part in it, which enables them to settle deposits amongst themselves.

## B. Administrative procedure

7 The applicant, Dansk Erhverv, is a trade association representing the interests of Danish undertakings. On 14 March 2016, it submitted a State aid complaint to the European Commission.

8 The complaint alleges that the Federal Republic of Germany granted to a group of North German retail undertakings, namely shops located near the border and specifically targeting consumers resident in neighbouring countries, in particular Denmark, unlawful aid incompatible with the internal market, consisting of an exemption from the general obligation to charge a deposit on non-reusable drinks packaging laid down in Paragraph 9(1) of the VerpackV.

9 The applicant noted in that regard that the border shops sold drinks in non-reusable packaging to Danish and Swedish consumers without charging the relevant deposit (EUR 0.25 including tax per can). According to the applicant, they refrained from charging the deposit with the agreement of the authorities of the two *Länder* concerned, namely Schleswig-Holstein and Mecklenburg-Vorpommern (Germany). Those authorities do not impose a fine on border shops where they do not charge the deposit. Furthermore, exemption from the deposit also entails an exemption from value added tax (VAT) relating to the amount of that deposit.

10 According to the German federal authorities questioned by the Commission following the applicant's complaint, the price of beer and other beverages was significantly higher in neighbouring countries, such as Denmark, than in Germany, due in particular to different wholesale prices, VAT and excise duties. This had led to a specialised border business, where retailers established in the two *Länder* concerned targeted customers from neighbouring countries, in particular Danish customers. About 20 undertakings currently carried out such a business in about 60 shops. Those undertakings (the 'border shops') employ around 3 000 employees and had set up the Interessengemeinschaft der Grenzhändler (IGG), an association representing the interests of the border shops. The product range of those retail outlets, which are typically located a few kilometres from the German-Danish border or from ferry ports, mostly consists of Danish and Swedish products. Those border shops mostly sell beer, mineral water and soft drinks, along with wine, spirits, sweets and tobacco products. Beer, mineral water and soft drinks are only sold in large packaging or 'trays' (for example, trays of 24 cans in plastic wrapping).

11 The German federal authorities also explained that the implementation of the VerpackV, and thus of the deposit scheme, was the responsibility of the competent regional authorities, under the division of competences laid down in the Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany) of 23 May 1949 (BGBl 1949 I, p. 1) ('the GG'). They maintained that only those authorities are competent to enforce the provisions of the VerpackV through administrative orders or the imposition of fines, as the federal Government does not have any autonomous enforcement powers in that respect.

12 Lastly, the German federal authorities stated that the border shops were required under the VerpackV to collect the deposit but also explained that, in the light of the objectives of the deposit scheme, in particular to support the existing German recycling system, where empty non-reusable drinks packaging can find its way back into economic circulation, the enforcement authorities of the two *Länder* concerned ('the competent German regional authorities') had assumed that the obligation to charge the deposit did not apply to border shops if the beverages were sold only to customers resident in particular in Denmark, and if those customers undertook in writing (by signing an 'export declaration') to consume those beverages and dispose of their packaging outside Germany. The

German federal authorities explained that each of those sales was recorded separately, with the name, identity card number and signature of the customer together with the receipt number. They also noted that deposit-free sales were limited to shrink-wrapped trays (usually containing 24 cans).

### C. Decision adopted by the Commission

13 On 4 October 2018, the Commission adopted Decision C(2018) 6315 final concerning State aid SA.44865 (2016/FC) – Germany – Alleged State aid to German beverage border shops ('the contested decision').

14 In the contested decision, the Commission confined itself to examining the condition relating to State resources, set out in Article 107(1) TFEU. In that regard, it examined in turn the three measures capable of constituting an advantage financed through State resources ('the contested measures'): non-charging of the deposit itself, non-collection of the VAT relating to the deposit and the non-imposition of a fine on undertakings which do not charge the deposit.

15 As regards the non-charging of the deposit, the Commission stated, in paragraphs 32 and 33 of the contested decision, that that measure did not constitute State aid, since the deposit scheme was not financed through State resources. It pointed out that the applicant did not claim that the non-charging of the deposit constituted, in itself, a measure financed by means of such resources.

16 As regards the non-charging of VAT on the value of the deposit, the Commission explained, in paragraphs 41 and 42 of the contested decision, that in a situation where the border shops did not charge the deposit to their customers, the non-charging of the relevant VAT by the border shops and then the non-collection by the State were the normal consequence of the application of the general VAT rules. According to the Commission, as VAT was due on the price of a transaction (provision of a service or goods), it did not need to be collected where there was no such transaction. The Commission inferred from this that the non-collection of VAT was not intended, by its purpose and structure, to create an advantage which would constitute an additional burden for the State and that therefore that measure was not State aid.

17 As regards the non-imposition of a fine on undertakings which did not apply the deposit scheme, the Commission first defined the general analytical framework applicable to the non-imposition of a fine (paragraphs 45 to 49 of the contested decision) and then applied that analytical framework to the non-imposition of a fine (paragraphs 50 to 69 of the contested decision).

18 Thus, the Commission noted, in paragraphs 45 and 47 of the contested decision, that, according to the case-law, a release from the obligation to pay fines could in principle constitute an advantage granted through State resources. However, the Commission stated that, in determining whether the condition relating to State resources was met, it was, in principle, appropriate to distinguish cases where the public authorities had introduced the possibility of avoiding the payment of fines that would normally be due from cases where the public authorities did not impose a fine because they had expressly authorised certain behaviour.

19 The Commission added, in paragraphs 48 and 49 of the contested decision, that the interpretation of a national rule imposing an obligation could prove difficult for the national authorities themselves, in particular where they were responsible for applying it. When the authorities are faced with serious and reasonable doubts concerning the scope and the meaning of such an obligation, the non-imposition of a fine is not necessarily the result of a decision taken by those authorities not to collect fines which are payable, but might be the mere consequence of difficulties of interpretation of the law. Such difficulties, according to the Commission, even if limited to certain provisions and regrettable, were inherent in any legal system. Consequently, the Commission considered that a distinction should also be made between situations in which the authorities were faced with

difficulties of interpretation of the law inherent in the normal exercise of their police power and situations in which they decided not to collect fines, which were payable, or provided undertakings with the means to avoid the payment of such fines. The Commission then noted, in paragraph 50 of the contested decision, that the competent German regional authorities took the view that, as a matter of law, there was no obligation on the border shops to charge the deposit, so that not charging the deposit did not, in their view, constitute an offence and the non-imposition of a fine was merely the consequence of no offence having been committed.

20 However, the Commission stated in paragraph 51 of the contested decision that it seemed, in the light of the wording of Paragraph 9(1) of the VerpackV, that to the extent that that provision applied to the 'German territory' and to 'putting drinks into circulation', it should be regarded as requiring border shops to charge the deposit.

21 The Commission nevertheless added, in paragraph 52 of the contested decision, that the absence of an obligation on the border shops to charge the deposit if they sold canned beverages exclusively to 'foreign resident' consumers who committed to consume the drinks outside Germany could also be considered to be in line with the guiding principles of the VerpackV.

22 In paragraph 53 of the contested decision, the Commission stated that the interpretation of the VerpackV by the competent German regional authorities, according to which no deposit needed to be charged by the border shops, relied on the objective of that provision, namely to promote the return of non-reusable drinks packaging in Germany and, more precisely, to incentivise customers, in particular those in Germany, to bring empty drinks packaging into a collection and recycling system organised throughout Germany that was easily accessible to German residents. The Commission observed that, according to the interpretation of the competent German regional authorities, that objective did not require the deposit to be charged on cans which were consumed abroad and not returned to Germany. It added that, again according to the interpretation of the competent German regional authorities, border shops were in the same situation as exporters of canned beverages, which sold goods not intended to be consumed in Germany and in packaging intended to be disposed of far from any recycling facilities connected to the German system. The VerpackV did not require those exporters to charge the deposit.

23 The Commission stated, in paragraphs 56 to 58 of the contested decision, that the position taken by the competent German regional authorities was based, in particular, on a 2005 report by a law professor, commissioned by the border shops. According to that report, the obligation on the border shops to charge the deposit infringed the GG and several provisions of EU primary law, namely Articles 18, 34 and 35 TFEU and Article 7(1) of Directive 94/62, to the extent that the obligation extended to the sale of canned beverages consumed abroad. In particular, the deposit represented a trade barrier for the end-consumers of the border shops who would never bring back the empty drinks packaging to get a refund of the deposit.

24 The Commission also pointed out, in paragraphs 59 and 60 of the contested decision, that, according to another report, also drafted in 2005 but this time commissioned by the German Federal Government, the deposit scheme did not infringe either the GG or EU law whereas, on the other hand, the non-charging of the deposit by border shops to customers consuming drinks abroad was contrary to Directive 94/62.

25 The Commission concluded, in paragraph 61 of the contested decision, that, although the interpretation given by the competent German regional authorities was not consistent with that given by the federal authorities, the latter had not been confirmed by a court ruling. The only court rulings, dating back to 2003, tended to confirm the interpretation given by the competent German regional authorities, as was acknowledged by the federal authorities.

26 On the basis of the factors just mentioned, the Commission took the view that, as it was reasonable to assume that, where a consumer purchased a beverage in Germany in order to take it to another Member State, the packaging of that beverage would not be returned to Germany but would end up in another Member State's waste management system, it appeared reasonable not to require the deposit to be charged when the consumer signed an export declaration undertaking to take the beverage to another Member State to consume it and dispose of its packaging there (paragraph 65 of the contested decision). The Commission also recalled that Member States were free to decide whether or not to charge the deposit on condition that they complied with the principle of non-discrimination (paragraph 67 of the contested decision). It noted that the interpretation given by the competent German regional authorities constituted an appropriate reconciliation of the objective of protecting the environment pursued by Directive 94/62 and the free movement of goods (paragraph 68 of the contested decision).

27 The Commission concluded that the competent German regional authorities were therefore faced, in the normal exercise of their police power, with serious and reasonable doubts concerning the scope and the meaning of the obligation to charge the deposit. In such a case, the non-imposition of a fine did not involve an advantage granted through State resources and the disputed measure could therefore not be regarded as State aid (paragraph 69 of the contested decision).

## II. Procedure and forms of order sought

28 By application lodged at the Court Registry on 23 January 2019, the applicant brought this action.

29 By document lodged at the Court Registry on 18 April 2019, the Federal Republic of Germany sought leave to intervene in the present proceedings in support of the form of order sought by the Commission. By decision of 9 September 2019, the President of the Ninth Chamber of the General Court granted the Federal Republic of Germany leave to intervene. The Federal Republic of Germany lodged its statement in intervention and the main parties lodged their observations on the statement within the prescribed periods. In that statement, it stated that it agreed with all the Commission's arguments.

30 By document lodged at the Court Registry on 26 April 2019, Danmarks Naturfredningsforening ('DN'), an environmental protection association in Denmark, sought leave to intervene in the present proceedings in support of the form of order sought by the applicant. By order of 10 September 2019, the President of the Ninth Chamber of the General Court granted DN leave to intervene. DN lodged its statement in intervention and the main parties lodged their observations on that statement within the prescribed periods.

31 By document lodged at the Court Registry on 7 May 2019, IGG sought leave to intervene in the present proceedings in support of the form of order sought by the Commission. By order of 10 September 2019, the President of the Ninth Chamber of the General Court granted DN leave to intervene. IGG lodged its statement in intervention and the main parties lodged their observations on the statement within the prescribed periods.

32 As a result of changes in the composition of the Chambers of the General Court pursuant to Article 27(5) of the Rules of Procedure of the General Court, the Judge-Rapporteur was assigned to the Fourth Chamber, to which the present case was accordingly allocated.

33 On a proposal from the Fourth Chamber of the Court, the Court decided, pursuant to Article 28 of the Rules of Procedure, to refer the case to a chamber sitting in extended composition.

34 On a proposal from the Judge-Rapporteur, the Court (Fourth Chamber, Extended Composition) decided to open the oral part of the procedure and, by way of measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, put written questions to the parties, asking them to answer those questions at the hearing.

35 The parties presented oral argument and answered the written questions and oral questions put to them by the Court at the hearing on 19 November 2020.

36 The applicant claims that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

37 The Commission contends that the Court should:

– dismiss the application;

– order the applicant to pay the costs.

38 The Federal Republic of Germany claims that the Court should:

– dismiss the application;

– order the applicant to pay the costs.

39 DN claims that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

40 IGG claims that the Court should:

– dismiss the application;

– order the applicant to pay the costs.

## III. Law

41 It is appropriate, first, to examine the admissibility of the action and then, secondly, to assess the merits of the arguments put forward by the applicant.

### A. Admissibility of the action

42 The Commission, in its defence, disputed the applicant's standing to bring proceedings by expressing 'doubts' as to the existence of a distortion of competition caused by the contested measures that would be liable to place the applicant in an unfavourable position. In that regard, the Commission stated, in the rejoinder, that the applicant had not adduced evidence of the identity of its members and the activities they carried out.

43 However, at the hearing, in response to a question from the Court concerning the application in the present case of the relevant case-law, the Commission withdrew its plea of inadmissibility based on the applicant's lack of standing to bring proceedings, formal note of which was recorded in the minutes of the hearing.

44 It is settled case-law that an association which, like the applicant, represents the interests of competitors of the beneficiaries of a measure is an interested party within the meaning of Article 108(2) TFEU (see, to that effect, judgment of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraph 29 and the case-law cited), which, moreover, the Commission noted in paragraph 1 of the contested decision. Such a party is entitled to challenge a decision by which the Commission finds, in the context of the preliminary stage of the procedure for reviewing aid under Article 108(3) TFEU, that a measure is not aid, provided that that party seeks, by bringing its action, to safeguard the procedural rights available to it if the Commission decided to initiate the formal investigation procedure under Article 108(2) TFEU (see, to that effect, judgments of 19 May 1993 *Cook* v *Commission*, C-198/91, EU:C:1993:197, paragraphs 23 to 26; of 2 April 1998, *Commission* v *Sytraval and Brink's France*, C-367/95 P, EU:C:1998:154, paragraph 47; and of 13 December 2005, *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, C-78/03 P, EU:C:2005:761, paragraph 35).

45 In the present dispute, the applicant raises a single plea in law by which it claims that the Commission, by not initiating the formal investigation procedure under Article 108(2) TFEU, despite the serious difficulties involved in the examination of the contested measures, infringed its procedural rights as an interested party under that provision. In those circumstances, the applicant has standing to bring proceedings and the action is, therefore, admissible.

### B. Examination of the single plea in law

46 As has just been stated, in support of its action, the applicant puts forward a single plea in law, alleging infringement of its procedural rights. That single plea in law consists of three parts. By the first part of the plea, the applicant alleges an insufficient examination by the Commission of the compatibility of the exemption from the deposit with Article 4(3) TEU, Directive 94/62, the 'polluter pays principle', and certain provisions of German law. By the second part, it alleges an insufficient examination by the Commission of VAT revenue foregone, since that measure is granted through State resources. Lastly, by the third part, the applicant alleges an insufficient examination by the Commission of the measure consisting of the non-imposition of a fine, since that measure is also granted through State resources.

47 As a preliminary point, it should be borne in mind that, according to the case-law, the procedure laid down in Article 108(2) TFEU, which guarantees the other Member States and the sectors concerned an opportunity to make their views known and allows the Commission to be fully informed of all the facts of the case before taking its decision, is essential whenever the Commission has serious difficulties in determining whether a plan to grant aid is compatible with the internal market. It follows that the Commission may restrict itself to the preliminary examination under Article 108(3) TFEU when taking a decision in favour of a plan to grant aid only if it is convinced after the preliminary examination that the plan is compatible with the Treaty. If, on the other hand, the initial examination leads the Commission to the opposite conclusion or if it does not enable it to overcome all the difficulties involved in determining whether the project is compatible with the internal market, the Commission is under a duty to obtain all the requisite opinions and for that purpose to initiate the procedure under Article 108(2) TFEU (judgments of 20 March 1984, *Germany* v *Commission*, 84/82, EU:C:1984:117, paragraph 13, and of 24 January 2013, *3F* v *Commission*, C-646/11 P, not published, EU:C:2013:36, paragraph 28).

48 It should also be borne in mind that, where an applicant claims that the decision adopted by the Commission on the basis of Article 108(3) TFEU infringes its procedural rights, it may invoke any plea in law, including a plea alleging an error of law, to show that the assessment of the information and evidence which the Commission had at its disposal during the preliminary investigation phase of the measure at issue should have raised doubts as to the compatibility of that measure with the internal market (see, to that effect, judgment of 24 May 2011, *Commission* v *Kronoply and Kronotex*, C-83/09 P, EU:C:2011:341, paragraph 59). The insufficient and incomplete content of the investigation carried out by the Commission during the preliminary examination phase is one of a number of factors which permit the inference that the Commission was not able to resolve all the serious difficulties encountered concerning whether the disputed measure constituted State aid (see, to that effect, judgment of 25 November 2014, *Ryanair* v *Commission*, T-512/11, not published, EU:T:2014:989, paragraph 106).

49 It is appropriate to examine in turn each of the three parts of the single plea in law, since the examination of the last two parts, both of which concern the condition relating to State resources, is grouped together within the same part.

### *1. The first part of the single plea in law*

50 The applicant submits that, in its assessment of the measure consisting in the exemption from the charging of the deposit, the Commission did not take into account the Federal Republic of Germany's obligations under Article 4(3) TEU, Directive 94/62, the 'polluter pays principle' and German law.

51 The applicant maintains that the non-compliance of that measure with those various rules invalidates the analysis in the contested decision concerning the existence of State aid and means that the Commission was not in a position to properly assess whether or not the non-charging of the deposit and, therefore, the non-payment of VAT on the deposit and the exemption from fines, constituted State aid.

52 The applicant points out that it is for the Commission to ensure that national systems transposing Directive 94/62 are actually applied and that the transposition gives rise to the adoption of sufficiently clear rules. It adds that the Federal Republic of Germany failed to ensure the result sought by that directive. The applicant also states that the Commission failed to take account of the considerable detrimental effects on the environment caused by the failure to charge the deposit.

53 Furthermore, the applicant criticises various paragraphs of the contested decision that appear in the part of the decision dealing with the non-imposition of a fine on border shops.

54 The Commission contends that the first part of the single plea is ineffective, which is disputed by the applicant.

55 DN submits that the contested decision is based on manifestly incorrect environmental assumptions and disregards the significant adverse effects of the export declaration practice on the Danish environment. It states that, since 2005, it has conducted annual 'litter collection' events, aimed at protecting the Danish environment by retrieving littered waste and that, since 2008, it has focused on the retrieval and collection of empty cans and has collected more than 1.6 million of these. According to its recorded findings, 90 to 95% of the collected cans are cans purchased deposit-free by Danish consumers in the border shops.

56 IGG submits that, during the administrative proceedings, the Commission investigated the compliance of the deposit scheme with Directive 94/62 and had no doubts as to the legality of the practice of waiving the deposit requirement where export declarations were used. That exemption is fully in line with Directive 94/62. Member States are not obliged to extend the deposit scheme to sales where the

purpose of the deposit, namely the return of empty packaging, cannot be achieved because many consumers have no practical possibility of returning empty containers and reclaiming their deposit. IGG does not share the applicant's concerns that the non-charging of the deposit would have negative effects on the environment in Denmark. Charging a deposit in border shops which will not be refunded in Denmark would be of no use for the collection of empty packaging and therefore would not reduce the amount of packaging waste. The systematic application of the deposit by border shops would have the economic effect of an export tax. Imposing a deposit on border shop sales would hinder the free movement of goods while failing to achieve the objective of the deposit, which is the return of the empty cans. The systematic application of the deposit by the border shops would therefore not be proportionate.

57 As follows from the summary of the applicant's arguments, the first part of the single plea alleges, in essence, serious difficulties resulting from the infringement by the measure at issue of obligations imposed on the Federal Republic of Germany. It must be pointed out that those obligations stem not from the provisions of the FEU Treaty or secondary legislation applicable in the field of State aid, but from other provisions of EU law, or indeed of German law. These include, in particular, provisions relating to the protection of the environment.

58 In the light of the parties' arguments and, in particular, the arguments put forward by the Commission in its defence, based on the ineffectiveness of the first part of the single plea in law, it is necessary to clarify to what extent provisions which do not relate to the law on State aid may usefully be relied on in order to establish that a State aid decision adopted by the Commission is unlawful.

59 In that regard, a distinction must be made depending on whether the Commission decision at issue determines whether aid is compatible with the internal market or whether it rules, as in the present case, on the existence of aid.

60 In the first situation, as the Court held in its judgment of 15 April 2008, *Nuova Agricast* (C-390/06, EU:C:2008:224, paragraphs 50 and 51), it is clear from the general scheme of the FEU Treaty that the procedure laid down in Article 108 must never produce a result which is contrary to the specific provisions of the Treaty. Accordingly, State aid, certain conditions of which contravene other provisions of the FEU Treaty cannot be declared by the Commission to be compatible with the internal market. That case-law was confirmed by the judgment of 22 September 2020, *Austria* v *Commission* (C-594/18 P, EU:C:2020:742, paragraphs 44 and 45).

61 Thus, the failure by a national measure, previously classified as State aid, to have regard to provisions of the FEU Treaty other than those relating to State aid may properly be relied on in order to challenge the legality of a decision by which the Commission considers that such aid is compatible with the internal market.

62 In the second situation, concerning a Commission decision ruling on the existence of aid, the same is not true. The classification of a national measure as State aid is based on conditions exhaustively set out in Article 107(1) TFEU. First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between the Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition (judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 53). None of those conditions refers to other provisions of the FEU Treaty or to legislation adopted by the European Union in the field of the environment.

63 The Court thus held that the need to take account of requirements relating to environmental protection, as follows from the provisions of the Treaties, however legitimate, did not affect the application of the condition of selectivity laid down in Article 107(1) TFEU and cannot justify the exclusion of selective measures, even specific ones such as environmental levies, from the scope of

Article 107(1) TFEU, as account may, in any event, usefully be taken of the environmental objectives when the compatibility of the State aid measure with the internal market is being assessed pursuant to Article 107(3) TFEU (see, to that effect, judgments of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraphs 90 to 92, and of 8 September 2011, *Commission* v *Netherlands*, C-279/08 P, EU:C:2011:551, paragraph 75).

64 Furthermore, the Court has held that the fact that a national measure was authorised by an institution in accordance with provisions of EU law other than those relating to State aid did not prevent the Commission from finding that the measure was State aid (see, to that effect, judgment of 10 December 2013, *Commission* v *Ireland and Others*, C-272/12 P, EU:C:2013:812, paragraphs 46, 47, 49 and 53). Similarly, the pursuit, by a national measure, of grounds of general interest – which fell within the scope of national law in the case at issue but which may also fall within the scope of EU law – such as environmental protection, is a circumstance which is 'ineffective' at the stage of classification as State aid on the basis of Article 107(1) TFEU (see, to that effect, judgment of 13 February 2003, *Spain* v *Commission*, C-409/00, EU:C:2003:92, paragraphs 53 and 54).

65 It would therefore be contrary to the wording of Article 107(1) TFEU to consider that a national measure, because it infringes other provisions of the Treaty, constitutes State aid even though it does not fulfil the conditions expressly laid down by that provision for the purpose of identifying aid.

66 Moreover, the provisions of Articles 107 and 108 TFEU pursue a specific objective, namely to prevent intervention by a Member State from distorting the conditions of competition within the internal market, which does not necessarily correspond to the objectives pursued by other provisions of the Treaties. In addition, in the implementation of Articles 107 and 108 TFEU, unlike that of other provisions of the Treaty, the intervention of the Commission plays a large part (see, to that effect, judgment of 23 April 2002, *Nygård*, C-234/99, EU:C:2002:244, paragraph 55). Finally, the effects of the application of those provisions are considerable, since the Commission may require a Member State to suspend implementation of a national measure, withdraw or amend it within a period which it determines. In the light of those specific features, the scope of the examination scheme for aid measures established by Articles 107 and 108 TFEU cannot be extended beyond national measures which fulfil the conditions set out in Article 107(1) TFEU.

67 It is true that Article 11 TFEU provides that environmental protection requirements must be integrated into the definition and implementation of EU policies and activities. However, such integration is intended to be carried out at the stage of the examination of the compatibility of aid and not that of the examination of its existence.

68 Consequently, the fact that a national measure infringes provisions of EU law other than those relating to State aid cannot reasonably be relied on, in itself, for the purposes of establishing that that measure is State aid.

69 The same applies, a fortiori, to legislation of a Member State.

70 According to settled case-law, the need for uniform application of EU law and the principle of equality require that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union; that interpretation must take into account the context of the provision and the purpose of the legislation in question (see judgment of 27 February 2003, *Adolf Truley*, C-373/00, EU:C:2003:110, paragraph 35 and the case-law cited).

71 In the present case, no express reference is made to the law of the Member States in Article 107(1) TFEU.

72 Furthermore, it is not for the Commission, but for the competent national courts, to review the legality of national measures in the light of national law.

73 If it were accepted that infringement of a Member State's legislation must lead the Commission to classify national measures as State aid, it might be required to rule on the lawfulness of those measures in the light of national law, in disregard of the jurisdiction of the national courts.

74 It follows from the considerations set out above that the first part of the single plea in law, alleging insufficient examination by the Commission of the measure consisting of the non-charging the deposit, in the light of the obligations imposed on the Federal Republic of Germany which do not stem from the provisions of the Treaty or from secondary legislation applicable in the field of State aid, but which stem from other provisions of EU law, and from national law, even if well founded, cannot lead to the annulment of the contested decision.

75 The first part of the single plea in law must therefore be rejected as ineffective, as the Commission correctly contends.

76 However, some of the applicant's criticisms of various paragraphs of the contested decision in the part relating to the non-imposition of a fine on border shops and the arguments relating to there being no difficulties in interpreting the applicable law, which are also likely to concern the non-imposition of a fine, will be examined, so far as is necessary, in the context of the third part of the single plea in law.

### *2. The second and third parts of the single plea in law, concerning the condition relating to State resources*

77 According to settled case-law, only advantages granted directly or indirectly through State resources or constituting an additional burden on the State are to be regarded as aid within the meaning of Article 107(1) TFEU. The very wording of that provision and the procedural rules laid down in Article 108 TFEU show that advantages granted from resources other than those of the State do not fall within the scope of the provisions in question (judgments of 17 March 1993, *Sloman Neptun*, C-72/91 and C-73/91, EU:C:1993:97, paragraph 19, and of 19 March 2013, *Bouygues and Bouygues Télécom* v *Commission and Others* and *Commission* v *France and Others*, C-399/10 P and C-401/10 P, EU:C:2013:175, paragraph 99).

78 In the contested decision, the Commission found that the condition relating to State resources was not satisfied as regards both the non-charging of the VAT relating to the deposit and the non-imposition of a fine. It concluded, solely on the basis of the finding that there were no State resources, that those two measures did not constitute State aid.

79 It is necessary to examine, first, the second part of the single plea in law, relating to the non-charging of the VAT relating to the deposit.

#### *(a) The second part of the single plea in law*

80 The applicant submits that the Commission was wrong to refer to the judgment of 17 March 1993, *Sloman Neptun* (C-72/91 and C-73/91, EU:C:1993:97), in the part of the contested decision dealing with the failure by border shops then by the State to collect the VAT relating to the deposit. That measure, unlike the measure at issue in that judgment, is not part of a 'legitimate system'.

81 The applicant relies on a series of arguments intended to show that the non-charging of the deposit, based on the export declaration practice, is not lawful and that, consequently, the non-collection of VAT constitutes an advantage financed through State resources. It refers, in particular, to the infringement of the various legal provisions already relied on in the first part of the single plea.

82 The applicant submits that, in order for a national measure to be regarded as not being financed through State resources, the Member State concerned must act as a regulator when it adopts that measure. That is not the case when the Member State foregoes revenue because of a measure which contravenes EU law.

83 The applicant also states that the non-charging of the deposit is applied for a reason unrelated to the purpose of the deposit scheme, namely in order to maintain employment and improve the competitiveness of border shops.

84 Furthermore, the applicant submits that that measure grants to its beneficiaries a selective advantage and that its purpose is to exempt the border shops from the VAT on the price of the deposit.

85 The Commission contends that the second part of the single plea in law should be rejected. In that regard, it submits, in particular, that the non-charging of the deposit is the primary issue in the present case and that the non-charging of VAT is only a 'secondary' consequence of the non-charging of the deposit (or, to use the terms of the judgment of 17 March 1993, *Sloman Neptun*, C-72/91 et C-73/91, EU:C:1993:97, an 'inherent' consequence).

86 DN supports the applicant's arguments. It invokes, inter alia, the judgment of 12 October 2000, *Spain* v *Commission* (C-480/98, EU:C:2000:559).

87 IGG supports the Commission's arguments. It adds that Paragraph 9(1) of the VerpackV ties in with Article 92(b) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347 p. 1), which provides that, as regards the costs of returnable packing material, Member States may include them in the taxable amount and take the measures necessary to ensure that that amount is adjusted if the packing material is in fact returned.

88 As a preliminary point, it is necessary to reject, on the basis of the considerations set out in response to the first part of the single plea, the arguments relating to the infringement of various provisions of EU law and German law already relied on by the applicant in that part.

89 Furthermore, in so far as the present part relates to the condition relating to the existence of State resources, it must be recalled that, for the purposes of establishing whether the advantage given to the beneficiary is a burden on the State budget, it is necessary to determine whether there exists a sufficiently direct link between, on the one hand, that advantage and, on the other hand, a reduction of that budget, or a sufficiently concrete economic risk of burdens on that budget (see judgment of 19 March 2013, *Bouygues and Bouygues Télécom* v *Commission and Others and Commission* v *France and Others*, C-399/10 P and C-401/10 P, EU:C:2013:175, paragraph 109 and the case-law cited).

90 In the present case, in order to reach the conclusion that the non-charging of VAT did not involve the use of State resources, the Commission relied, in the contested decision (paragraph 42), on the approach taken by the Court in the judgment of 17 March 1993, *Sloman Neptun* (C-72/91 and C-73/91, EU:C:1993:97). As is apparent from the presentation of the applicant's arguments, it disputes, in essence, the relevance of the application of that approach to the non-charging of VAT. It is therefore necessary to consider the approach taken by the Court in that judgment, which was adopted in other subsequent judgments.

91 The case that gave rise to the judgment of 17 March 1993, *Sloman Neptun* (C-72/91 and C-73/91, EU:C:1993:97), concerned a legal scheme allowing German shipowners to conclude employment contracts with crew members who were not subject to German law (paragraph 5) The Court held that the condition relating to State resources was not satisfied.

92 The Court took the view that the scheme at issue did not seek, through its object and general scheme, to create an advantage which would constitute an additional burden for the State, but only to alter in favour of shipping undertakings the framework within which contractual relations were formed between those undertakings and their employees. In addition, it held that the consequences arising from that scheme, in so far as they related to the difference in the basis for the calculation of social security contributions and to the loss of tax revenue because of the low rates of pay, were inherent in that scheme and not a means of granting a particular advantage to the undertakings concerned (paragraph 21).

93 It follows that, in order to assess the existence of the link referred to in paragraph 89 above, it is necessary, in particular, to ascertain whether, by virtue of its object and general scheme, the measure seeks to create an advantage which would constitute an additional burden for the State. In particular, where any loss of resources resulting from the measure is inherent in the measure, in the sense that it is only an indirect consequence, the condition concerning State resources is not fulfilled (see, to that effect, judgments of 17 March 1993, *Sloman Neptun*, C-72/91 and C-73/91, EU:C:1993:97, paragraph 21; of 1 December 1998, *Ecotrade*, C-200/97, EU:C:1998:579, paragraph 36; and of 13 March 2001, *PreussenElektra*, C-379/98, EU:C:2001:160, paragraph 62). By contrast, where the measure is intended to exempt an undertaking from the payment of sums which otherwise would be payable to the State budget, the connection between the measure and the reduction of the State budget is sufficiently direct for the measure to be regarded as financed through State resources (see, to that effect, judgment of 8 September 2011, *Commission* v *Netherlands*, C-279/08 P, EU:C:2011:551, paragraphs 106 to 108).

94 In the present case, it must be borne in mind that, under Paragraph 9(1) of the VerpackV, the price of the deposit invoiced to the customer includes VAT. Consequently, where border shops do not apply the deposit, the VAT on the deposit is not collected in respect of the sales concerned.

95 There is therefore, potentially at least, a loss of tax revenue for the State, since the deposit scheme, if applied, would probably lead to net VAT revenue. It is unlikely that, despite the charging of the deposit, all packaging will be systematically returned and that, consequently, the VAT charged on sales will be refunded in full to the consumers to whom it has been invoiced.

96 However, the contested measure, consisting of the non-charging of the deposit by border shops, is not intended to grant those undertakings an advantage which is represented by the non-charging of VAT. The non-charging of VAT, where the deposit is not applied, is, as the Commission rightly submits, only an indirect consequence of the mechanism for waiving the deposit, which is inherent in the non-charging of the deposit, and does not establish that the measure at issue is intended, in that regard, to confer an advantage on certain undertakings through State resources.

97 It must therefore be held that the Commission was fully entitled to conclude, referring to the case-law arising from the judgment of 17 March 1993, *Sloman Neptun* (C-72/91 and C-73/91, EU:C:1993:97), that the condition relating to State resources was not satisfied as regards the non-charging of the VAT relating to the deposit.

98 The conclusion in paragraph 97 above cannot be called into question by the other arguments of the applicant or of DN.

99 First, contrary to what is claimed by the applicant, it is not apparent from the case-law referred to in paragraph 93 above that it is necessary, in order for a national measure not to be regarded as being financed through State resources, that that measure is a ‘legitimate system’ or that the State concerned acts as regulator.

100 Indeed, in certain situations, the objectives of the measure at issue may be taken into account. However, that is not the case where the only indirect effect of that measure is to reduce the taxable amount of a tax and there is therefore no sufficiently direct link between that measure and the loss of revenue which can be established, with the result that that loss may be classified as 'inherent' to the measure.

101 Furthermore, in the judgment of 17 March 1993, *Sloman Neptun* (C-72/91 and C-73/91, EU:C:1993:97), the Court, for the purposes of determining whether the condition relating to State resources was satisfied, did not, as such, review the lawfulness of the measure at issue or that of the objectives which it pursued. It merely ensured, on the basis of the purpose and general scheme of that measure, that the alleged losses of resources were not in reality a means of granting a particular advantage to the undertakings concerned (judgment of 17 March 1993, *Sloman Neptun*, C-72/91 and C-73/91, EU:C:1993:97, paragraph 21).

102 Secondly, the fact that the non-collection of the VAT on the deposit may lead to a selective advantage to its recipients, even if it were to be established, is ineffective, since, first, the conditions listed in Article 107(1) TFEU which allow a national measure to be classified as State aid are cumulative (see the case-law referred to in paragraph 62 above and the judgment of the Court of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00, EU:C:2003:415, paragraphs 74 and 75) and, secondly, that, in the present case, in order to conclude in the contested decision that the non-collection of VAT on the deposit was not aid, the Commission relied on State resources not being involved, that is on a condition separate from that concerning the existence of a selective advantage.

103 Thirdly, the applicant has adduced no evidence to show that the aim of the contested measures was, in reality, to exempt border shops from VAT on the price of the deposit, since that exemption appears, as is apparent from the considerations set out above, to be 'an inherent side-effect [of those measures]', to use the expression employed by Advocate General Jacobs in his Opinion in *PreussenElektra* (C-379/98, EU:C:2000:585, points 161 and 162).

104 Fourthly, DN's reliance on the judgment of 12 October 2000, *Spain* v *Commission* (C-480/98, EU:C:2000:559) is not relevant because the case which gave rise to that judgment concerned a failure to recover the tax and social security debts of certain undertakings, a situation which corresponds to that considered by the Court in the judgment of 8 September 2011, *Commission* v *Netherlands* (C-279/08 P, EU:C:2011:551), in which the link between the measure and the loss of revenue for the State budget was sufficiently direct.

105 It follows from all of the foregoing that the second part of the single plea in law relied on by the applicant must be rejected.

### *(b) The third part of the single plea in law*

106 In the first place, the applicant submits that the Commission misapplied the Court's case-law by introducing a new legal standard in accordance with which difficulties in interpreting the applicable law can lead to the conclusion that a national measure which involves the non-imposition of a fine does not meet the State resources test.

107 In that regard, the applicant claims that there was an error of law. The test applied by the Commission relating to difficulties in interpretation of the applicable law is not in line with the case-law, according to which the existence of State aid is assessed on the basis of the effects of the measure and not on the basis of its objective or the intentions of the national authorities behind that measure.

108 Furthermore, the applicant takes the view, in the present case, that there are no difficulties of interpretation as regards the obligation to apply the deposit and therefore to impose a fine on shops which do not apply that deposit. It states that the non-imposition of a fine is rather the result of a deliberate choice by the competent German regional authorities.

109 Lastly, the applicant adds that, if application of the State aid rules could be evaded simply by establishing serious and reasonable doubts concerning the scope and the meaning of an obligation in a piece of national legislation or EU legislation, that could be abused. It states that such a possibility would run counter to the obligations of Member States to implement EU directives in a clear and unequivocal manner.

110 In that regard, according to the applicant, the competent German regional authorities had decided, in the present case, following judgments delivered in 2003 by the courts of the *Land* of Schleswig-Holstein, not to require border shops to charge the deposit laid down by the VerpackV and not to take any new administrative measure of constraint against those shops, measures which could subsequently have been the subject of judicial review by the German courts. Thus, according to the applicant, the lack of case-law clarifying the law on the basis of which fines are imposed was solely the result of the inaction of those authorities. The applicant adds that it would seriously weaken the enforcement of EU law, including State aid law, if a Member State authority could lawfully, over many years, systematically avoid enforcing the law.

111 In the second place, the applicant submits that there are serious difficulties with regard to the question of whether the State resources test is met in relation to the non-imposition of a fine.

112 First, continuing its line of argument in relation to the first part of the single plea, the applicant reiterates that the non-charging of the deposit infringes various provisions of EU law and German law and, as that infringement is obvious, there is no difficulty of interpretation. It adds that the German federal authorities have consistently reiterated that the export declaration practice was unlawful.

113 Secondly, the applicant notes that there is no legal basis in environmental law to justify the non-charging of the deposit. It also claims that that measure is not applied consistently in all the German border areas. It adds that the Commission conducted an inadequate and incomplete investigation of the situation. Lastly, it states that the border shops are not in a comparable situation to that of exporters.

114 Furthermore, the applicant maintains that the Commission's finding in the contested decision that there were no State resources involved cannot be justified by the need for the non-charging of the deposit in order to avoid a breach of the principle of free movement of goods. The Commission's argument that the application of the deposit scheme would amount to the imposition of an export tax is a new argument which was not included in the contested decision and which is therefore inadmissible. The applicant also disputes the assumption that, when a consumer purchases a beverage in Germany in order to take it to another Member State, the packaging will not be returned to Germany but will end up in the waste management system of the other Member State.

115 The Commission disputes that argument. The Commission submits inter alia that the interpretation given to the applicable legislation by the competent German regional authorities was reasonable, having regard, in particular, to the lack of any definitive court ruling to the contrary and that it was therefore not possible for it to make a finding of State aid. The non-imposition of a fine derives in the present case only from the interpretation of the legislation adopted by the competent German regional authorities, according to which the deposit must not be charged by border shops. It must be distinguished from cases where the competent authorities decide to exempt undertakings which are infringing the legislation from payment of a fine.

116 According to the Commission, the interpretation of the legislation which justifies the non-imposition of a fine is similar to an authorisation granted to certain categories of persons by the competent authority allowing conduct which is prohibited for other categories of persons. In any event, the non-imposition of a fine in the context of difficulties in interpreting the relevant legislation does not go beyond the discretion enjoyed by the authorities responsible for applying the law.

117 The Commission states in addition that applying the deposit to the border shops would create a barrier to trade and amount to an export tax.

118 The Commission also adds that there is no evidence to suggest that one of the objectives of the deposit scheme is to incentivise the consumer to buy drinks in packaging which is less harmful to the environment. It states, in addition, that a national deposit scheme cannot aim to reduce environmental harm caused in other Member States, nor to reduce sales of beverages in non-reusable packaging, but should only aim to incentivise consumers to bring back that type of drinks packaging.

119 It states, furthermore, that the border shops requested to join the Danish deposit scheme but that they were not permitted to do so following opposition from the applicant.

120 According to the Commission, acceptance by the competent German regional authorities of the export declaration practice is logical since, as a result of that practice, the only situation in which the deposit is not charged is where customers undertake that the drinks they purchase in the border shops will not be consumed within Germany.

121 The Commission submits that the controversy of which the applicant complains actually derives from a failure on the part of the Danish waste management system to take account of cross-border sales. According to the Commission, the fact that customers buying cans in the border shops have no obligation to take part in the Danish system is an issue for the Danish recycling system, rather than a problem linked to the German exemption from the deposit charge.

122 The Commission states also that that issue can only be solved bilaterally between the countries concerned or at European level through greater harmonisation. The only conceivable solution is therefore a political one.

123 The Commission also submits that the position of end-consumers who do private shopping in the border shops and that of professional exporters are entirely comparable because, in both cases, the waste is generated in Denmark.

124 The Commission adds that the State resources test is not met since the applicant has not established the amount of fines that were due but which were not paid.

125 DN supports the applicant's arguments. It claims, inter alia, that the Commission applied an incorrect test when assessing whether the non-imposition of a fine constituted State aid. It adds that no reasonable authority would have acted as the competent German regional authorities did. It also states that there is no obligation to establish the amount of the fines waived for a fine exemption measure to be categorised as State aid.

126 IGG submits that it must be borne in mind that the competent German regional authorities are not required to impose a fine and can simply order an undertaking to change its behaviour under Paragraph 62 of the Life-Cycle Management Act. It adds that the competent German regional authorities follow this approach when presented with difficulties of legal interpretation, such as in the present case with regard to the scope of the obligation to charge the deposit.

127 As a preliminary point, it should be borne in mind that border shops refrain, in certain circumstances, from charging the deposit. That conduct is made possible by the simple practice on the part of the competent German regional authorities of considering that the deposit is not due when the drinks are purchased under the export declaration and, consequently, not imposing fines on those shops in that situation. It is not apparent from the documents before the Court that the competent German regional authorities adopted any circular or guideline for the purpose of authorising the conduct at issue of border shops. When questioned on this point at the hearing, the Commission and IGG were unable to refer to the existence of such legal measures.

128 It is necessary, first of all, to examine the applicant's complaint that the Commission wrongly applied an unprecedented legal test alleging the existence of difficulties in interpreting the legislation at issue in order to assess whether the non-imposition of a fine constituted an advantage financed through State resources.

*(1) The error of law alleged by the applicant*

129 Before ruling, first, on the validity of the test used by the Commission in order to determine whether the condition relating to State resources is satisfied and, secondly, on whether or not the Commission applied that test incorrectly in the present case, it is necessary to refer to the relevant case-law.

*(i) The Court's case-law on the application of the condition relating to State resources in the event that a fine is not imposed*

130 The Court has, to date, drawn a distinction between two situations. In the first, that of fine 'exemptions', certain undertakings are exempted from payment of a fine which they should normally or inevitably have to bear under the legislation. In that situation, the condition relating to State resources is considered to be satisfied (see, to that effect, judgments of 1 December 1998, *Ecotrade*, C-200/97, EU:C:1998:579, paragraph 45, and of 8 September 2011, *Commission* v *Netherlands*, C-279/08 P, EU:C:2011:551, paragraph 106). In the second, that of 'authorisations', certain undertakings are formally granted, on the basis of transparent and pre-defined criteria, authorisation to adopt certain behaviour by the competent authorities. As that behaviour is therefore authorised by the legislation, the non-imposition of a fine on those undertakings cannot, if the authorisation involves no unjustified difference in treatment in relation to other undertakings, be regarded as an advantage financed through State resources (see, to that effect, judgment of 14 January 2015, *Eventech*, C-518/13, EU:C:2015:9, paragraphs 36, 37 and 49).

*(ii) Application of a new test, based on the existence of difficulties in interpreting the applicable provision with which the national authorities are faced in the normal exercise of their police power*

131 In the present case, it should be noted, as a preliminary point, that the non-imposition of a fine, unlike the non-charging of the VAT relating to the deposit, is not an indirect or 'secondary' consequence of the non-charging of the deposit, which is inherent in that measure within the meaning of the judgment of 17 March 1993, *Sloman Neptun* (C-72/91 and C-73/91, EU:C:1993:97). The competent German regional authorities consider that, where beverages are purchased under the export declaration, there is no infringement of the legislation punishable by fine. Since the non-charging of the deposit in such a situation complies with that legislation, as those authorities interpret it, imposing a fine on border shops is necessarily precluded.

132 Such a context, in which the non-imposition of a fine is inseparable from the non-charging of the deposit and, therefore, from the interpretation of the relevant legislation, does not correspond to either of the two situations hitherto considered in the case-law on fines.

133 First, the Commission could not rely on the existence of an authorisation which the competent authorities had granted to the undertakings concerned to adopt a particular conduct, here an exemption from the obligation to charge the deposit. The exemption from the deposit is the result, not of a prior and transparent authorisation, laid down by legislation, but of a mere practice on the part of the competent German regional authorities, which has been in place since 2005, or even since 2003, not to impose a fine on border shops where those shops do not charge the deposit.

134 Secondly, the non-imposition of a fine is not the result of an express exemption from the obligation to charge the deposit set out in the VerpackV, which the author of that legislation had adopted. It is not apparent from the documents before the Court that the competent German regional authorities have the power to amend the VerpackV – which was adopted by the federal authorities – in order, inter alia, to introduce derogations from the obligation to apply the deposit. On the contrary, it is apparent from the documents before the Court that the regional authorities have only criminal jurisdiction in respect of the obligation to apply the deposit. Furthermore, the competent German regional authorities have not adopted any legislative provision or written instruction recognising the existence of a derogation from the obligation to charge the deposit. The failure to charge the deposit and, accordingly, the non-imposition of a fine do not, therefore, stem from an exemption from the legislation, unlike the measure on which the Court ruled in the judgment of 8 September 2011, *Commission* v *Netherlands* (C-279/08 P, EU:C:2011:551), but from a mere interpretation of the legislation in force, accepted in practice by the competent German regional authorities.

135 In those circumstances, the Commission was right to rely on a new legal test, based on the link between the interpretation of the relevant legislation and the exercise of the power to impose penalties by the authorities with that power, in order to examine whether the non-imposition of a fine could be regarded as an advantage financed through State resources. The Commission was also fully entitled to consider that the difficulties in interpreting legislation were, in principle, capable of precluding the non-imposition of a fine from being regarded as an exemption from a fine constituting State aid. The situation in which there are difficulties in interpreting a provision non-compliance with which may be penalised by the imposition of a fine is clearly different, from the point of view of the advantage in question, from that in which the competent authority decides to exempt an undertaking from payment of a fine which it would have to bear under the legislation. In the first situation, unlike the position in the second, there is no pre-existing charge. In view of the uncertain scope of the provision, the existence of unlawful conduct is not obvious and the penalising of such conduct by a fine does not therefore appear, where there is such uncertainty, to be necessary or inevitable.

136 Furthermore, the Court recalled that measures not subjecting certain conduct to penalties were inherent in any legal system (see, to that effect, judgment of 14 January 2015, *Eventech*, C-518/13, EU:C:2015:9, paragraph 36) and Advocate General Wahl, in point 39 of his Opinion in *Eventech* (C-518/13, EU:C:2014:2239), noted that fines are instruments which belong to the sphere of public policy. It is therefore necessary to preserve the discretion of the Member States in this area, including where there are difficulties in interpreting the relevant provision.

137 It must therefore be concluded that the Commission's reasoning was not vitiated by an error of law when it considered that, in order to find that there was no State resources in relation to a measure consisting, for a public authority, in not imposing a fine, it was necessary, in a situation such as that in the present case, to apply a new test, based on the existence of difficulties in interpreting the relevant provision with which the national authorities are faced in the exercise of their police powers.

138 Consequently, the applicant's complaint must be rejected on that point.

139 However, the applicant also maintains that the test adopted by the Commission could lead to abuses. That is so in the present case, since the possible difficulties of interpretation in question are likely to persist.

*(iii) The failure to place a temporal limitation on the test relating to the existence of difficulties in interpreting the relevant provision with which the national authorities are faced in the exercise of their police powers*

140 It should be recalled that the principle that criminal offences and penalties must have a proper basis in law, which is one of the general legal principles underlying the constitutional traditions common to the Member States, has also been enshrined in various international treaties, and in particular in Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 (see, to that effect, judgment of 22 May 2008, *Evonik Degussa* v *Commission*, C-266/06 P, not published, EU:C:2008:295, paragraph 38 and the case-law cited). Article 49(1) of the Charter of Fundamental Rights of the European Union reaffirms that principle by providing that 'no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed'.

141 The principle that offences and penalties must be defined by law requires the law to give a clear definition of offences and the penalties which they attract (judgment of 22 October 2015, *AC-Treuhand* v *Commission*, C-194/14 P, EU:C:2015:717, paragraph 40).

142 It is desirable that the wording of legislation, in particular where it contains penal provisions should not contain any ambiguity in order to enable the persons to whom that legislation applies to direct their conduct in full knowledge of the facts and to be penalised as a consequence only if they have, intentionally or negligently, failed to fulfil an obligation imposed on them.

143 It would therefore seem paradoxical if difficulties in interpreting such legislation allow Member States, which are the authors of that legislation, to avoid, without any temporal limitation, their obligations in relation to State aid. Those difficulties should justify non-imposition of a fine only for a limited and reasonable period, during which the applicable legislation must be clarified.

144 The ambiguity or lack of clarity of national legislation appears even less capable of justifying the exclusion of a measure from the scope of Article 107(1) TFEU, since the purpose of that legislation is, as in the present case (see paragraph 1 above) to transpose a directive.

145 In that regard, according to settled case-law, in relation to the transposition of a directive into the legal order of a Member State, it is essential that the national law in question actually ensure the full application of the directive, that the legal situation arising from that law should be sufficiently precise and clear to satisfy fully the requirements of legal certainty and that individuals are made fully aware of their rights and, where appropriate, to rely on those rights before the national courts (see judgment of 27 October 2011, *Commission* v *Poland*, C-311/10, not published, EU:C:2011:702, paragraph 24 and the case-law cited).

146 It follows from the considerations set out in paragraphs 140 to 145 above that the test relating to the existence of difficulties in interpreting the applicable legislation can apply only on condition that those difficulties are temporary and that they form part of a process of gradual clarification of legislative provisions.

147 It should be borne in mind in that regard that the principle that offences and penalties must be defined by law is observed where the individual can know, on the basis of the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable (judgment of 22 October 2015, *AC-Treuhand* v *Commission*, C-194/14 P, EU:C:2015:717, paragraphs 39 and 40). That principle cannot therefore be interpreted as precluding the gradual, case-by-case clarification of the rules on criminal liability by judicial interpretation, provided

that the result was reasonably foreseeable at the time the offence was committed, especially in the light of the interpretation put on the provision in the case-law at the material time (see, to that effect, judgment of 22 October 2015, *AC-Treuhand* v *Commission*, C-194/14 P, EU:C:2015:717, paragraph 41).

148 In the present case, the Commission held, in paragraph 69 of the contested decision, that the mere fact that the national authorities were faced, in the context of the normal exercise of their police power, with serious and reasonable doubts concerning the scope and meaning of the applicable legislative provision was sufficient to conclude that there were no State resources. By such reasoning, the Commission did not refer to the temporary and inherent nature of the gradual clarification of the abovementioned difficulties of interpretation of the legislative provisions, although those two conditions must be satisfied in order for it to be possible to reach a finding that there are no State resources.

149 As regards the temporary nature of any difficulties in interpreting the applicable legislation on which the Commission relied in the contested decision, it should be noted that, whereas the contested decision was adopted on 4 October 2018 and that uncertainty had continued, according to the Commission, from at least 2005, or even 2003, the Commission does not refer to any particular circumstance capable of justifying the continuation of such uncertainty over such a long period.

150 As regards the inherent nature of the gradual clarification of the difficulties in interpreting the applicable legislation on which the Commission relied in the contested decision, there is nothing in the documents before the Court to suggest that such difficulties were in the process of being resolved.

151 On the contrary, in paragraph 62 of the contested decision, the Commission stated the following:

‘In such cases of disagreement regarding the interpretation of national law, the German authorities explained that the German institutional setup lays down a procedure based on a sustained dialogue between the federal State and the regions, which can lead to the possibility for the German senate (*Bundesrat*) to eventually rule on the matter. The procedure has however not been used in this case.’

152 This provides support for a finding that there has been a failure to implement a process of gradual clarification of the provisions specifically laid down for that purpose by German law.

153 It is true, moreover, that reference is made, in the contested decision, to a judgment at first instance, subsequently upheld on appeal, which supports the position of the competent German regional authorities.

154 However, the Commission noted that such a judgment was not final, having regard to the interim nature of the proceedings in question, which, moreover, did not appear to be based, according to the wording itself of the contested decision, on a detailed examination of the lawfulness of the practice of border shops. Although, at the hearing, IGG stated that the Oberverwaltungsgericht Schleswig-Holstein (Higher Administrative Court, Schleswig-Holstein, Germany) had, in its judgment of 23 July 2003, upheld the decision of the lower court by ruling clearly in favour of the interpretation given by the competent German regional authorities, that finding does not appear in the contested decision.

155 Furthermore, it is common ground that the competent German regional authorities decided, following the judgments delivered in 2003, not to adopt new administrative constraint measures against border shops which did not apply the deposit when, at federal level, there was an interpretation of the applicable legislation which was incompatible with their interpretation (paragraph 61 of the contested decision) and such measures could have given rise to a definitive interpretation of the applicable legislation by the national courts. Moreover, in the proceedings brought before them, the national

courts concerned could have sought preliminary rulings from the Court concerning the conformity of the non-imposition of a fine with EU law, whether in relation to the environment or freedom of movement, both of those aspects having been addressed by the Commission in the contested decision.

156 The absence of new judicial proceedings since 2003, although the interpretation of the federal legislation adopted by the competent German regional authorities did not correspond to that of the government which was the author of that legislation, is further evidence of the fact that the difficulties in interpreting the applicable legislation were not part of a process of gradual clarification of the legislative provisions.

157 In the light of the considerations set out in paragraphs 140 to 156 above, it must be held that the Commission erred in law in concluding that the condition relating to State resources was not satisfied without examining whether the difficulties of interpretation on which it relied were temporary and inherent in the gradual clarification of the legislative provisions. The insufficient and incomplete examination of that question by the Commission during the preliminary stage is, in accordance with the case-law set out in paragraph 48 above, evidence from which it may be concluded that the Commission was not in a position to overcome, at that preliminary stage, all the serious difficulties encountered in determining whether the non-charging of the deposit and the non-imposition of a fine constituted State aid.

158 It is also necessary to examine whether, as the applicant also submits, the Commission was wrong to consider that there were difficulties in interpreting the applicable legislative provision in the present case capable of justifying a finding that there were no State resources.

*(iv) The absence of difficulties in interpreting the applicable legislative provision capable of justifying a finding that there were no State resources*

159 As stated in paragraph 137 above, it may be accepted that the condition relating to State resources is not satisfied, in respect of the non-imposition of a fine, where there are difficulties in interpreting the applicable legislation.

160 However, the author of the measure in question should itself base its decision not to impose a fine on the existence of such difficulties.

161 In the present case, the competent German regional authorities, in order to justify their decision not to impose a fine on border shops, do not rely on the existence of uncertainty as to the interpretation of the VerpackV, but on their consistent interpretation of it since 2005, or even 2003, in accordance with which the obligation to charge the deposit does not apply to border shops when they sell cans to customers residing in border countries, in particular Denmark, and agree to sign an export declaration.

162 The Commission itself acknowledges, as is apparent from paragraph 50 of the contested decision, that the competent German regional authorities expressly take the view that border shops are not required to charge the deposit as a matter of law. Furthermore, it states that that interpretation of the VerpackV is applied uniformly to all shops established in the relevant German territories (paragraph 55 of the contested decision).

163 The Commission was therefore wrong to take the view that it could, in the present case, apply the test based on the existence of difficulties in interpreting the applicable legislative provision, when the competent German regional authorities did not rely on the existence of such difficulties in order to justify their practice of not imposing fines on border shops when they do not charge the deposit.

164 The contested decision therefore misapplied the test of difficulties in interpreting the applicable legislation. That error, like that found in paragraph 157 above, is further evidence that the Commission was not, without initiating the formal investigation procedure, in a position to overcome the serious difficulties raised by the examination of the two inextricably linked measures, namely the non-charging of the deposit and the non-imposition of a fine.

165 It is now necessary to examine the applicant's other arguments relating to the existence of serious difficulties in examining those measures.

*(2) The applicant's other arguments concerning the existence of serious difficulties*

166 In the present case, by not imposing a fine, the competent German regional authorities allow border shops not to charge a deposit on some of their sales of beverages. They consider that that practice complies with the VerpackV if certain criteria are met. The criteria adopted by the competent German regional authorities in order to define the scope of the exemption from the deposit are, in addition to the fact that it applies to border shops, its restriction to consumers residing in border countries, in particular Denmark, who agree to sign an export declaration.

167 The applicant disputes the competent authorities' interpretation of the VerpackV and submits that the Commission should have found that there were serious difficulties in that regard.

168 It is necessary to examine that complaint and then the other arguments raised in defence by the Commission and IGG in order to dispute the existence of serious difficulties.

*(i) The challenge to the interpretation of the VerpackV adopted by the competent German regional authorities*

169 In the first place, the applicant submits that there is no legal basis in the applicable legislation for the non-charging of the deposit by border shops.

170 In that regard, it should be borne in mind that the Commission itself stated, in paragraph 51 of the contested decision, that, in view of its scope, Article 9(1) of the VerpackV had to be understood as requiring border shops to charge the deposit.

171 In addition, the Commission acknowledged, in its written pleadings before the Court, that the competent German regional authorities '[did] not claim that there [was] a specific legal basis in [the VerpackV] for exempting the border shops from the obligation to charge the deposit'.

172 Furthermore, as regards EU law, the Commission stated in the contested decision (paragraph 67) that Directive 94/62 did not lay down any exception justifying not applying the deposit to border shops.

173 Consequently, the applicant's assertion that there is no specific legal basis in the applicable legislation justifying the non-charging of the deposit by border shops appears to be borne out.

174 That absence of any legal basis, where there is, moreover, an obligation in the text of the legislation to charge the deposit, which is explicit, unambiguous and the scope of which appears to be very wide (see paragraphs 2 and 3 above), leads to uncertainty as to the interpretation of the VerpackV adopted by the competent German regional authorities and supports the existence of serious difficulties.

175 In the second place, although the competent German regional authorities adopted an interpretation of the VerpackV to the effect that the obligation to charge the deposit does not apply to border shops when they sell beverages to customers residing in border countries, in particular Denmark, and agree

to sign an export declaration, it is clear from paragraph 59 of the contested decision that, according to a report drawn up at the request of the German federal authorities, the deposit must also be applied in that situation.

176 In addition, it is apparent from paragraph 61 of the contested decision that 'the interpretation by the [competent German regional authorities] is not consistent with the interpretation [of the federal authorities]'.

177 That divergence in the interpretation of the VerpackV between the German federal authorities and the competent German regional authorities, in particular as to whether the non-charging of the deposit by border shops is compatible with that legislation and with Directive 94/62, gives rise to doubts as to whether the competent German regional authorities' interpretation could be regarded as an 'appropriate reconciliation', as the Commission described it in paragraph 68 of the contested decision. Such a divergence constitutes evidence of the existence of serious difficulties.

178 In the third place, the Commission stated, in paragraph 55 of the contested decision, that the non-imposition of a fine was 'consistently applied to all shops established on the relevant German territory (especially in the two *Länder* at stake) which exclusively serve foreign customers ready to undertake they will transport and consume the drinks and dispose of the empty packaging outside Germany (this is required by the "export declaration")'.

179 The assertion that a derogation from the deposit scheme is applied in a consistent and uniform manner throughout Germany is worded ambiguously. Thus, the Commission does not expressly state that the non-charging of the deposit is tolerated in border areas other than those in the *Länder* of Schleswig-Holstein and Mecklenburg-Vorpommern. Nor does it provide any details concerning other German regions in which such a concession is also applied. At the hearing, in reply to a question from the Court, the Commission and IGG did not state that other *Länder* had adopted the same derogation from the deposit scheme.

180 Moreover, although the assertion in paragraph 178 above is disputed by the applicant, the Commission confined itself, in its written pleadings, to adding, without further explanation, that consumers in Member States other than the Kingdom of Denmark and the Kingdom of Sweden '[were] apparently not interested' in using export declarations.

181 Consequently, the existence of a derogation from the charging of the deposit consistently applied in all German border areas has not been established, which undermines the argument that the non-charging of the deposit and the non-imposition of a fine are based on objective reasons inherent in the deposit scheme, connected with the specific nature of the sales made in those areas.

182 That conclusion raises doubts as to the interpretation of the VerpackV adopted by the competent German regional authorities and supports the existence of serious difficulties.

183 In the fourth place, the applicant refers to a proposal to amend the VerpackV, from 2004, submitted by the *Länder* of Schleswig-Holstein and Mecklenburg-Vorpommern.

184 It is not disputed that the following extract appeared in that proposal:

'At the request of the final distributor, the responsible authority has granted an exemption from duties in accordance with paragraph 1 for beverages in non-reusable packaging that are distributed to end consumers at sea ports or areas near a border for consumption outside the area of validity of the regulation (border trade), when the applicant has taken appropriate and reasonable measures to ensure that the packaging does not result in waste in the area of validity of the regulation and that deposit return within the area of validity of the regulation is not possible.

…

Justification

…

At the border with Denmark and at ferry ports and the areas surrounding them in Schleswig-Holstein and Mecklenburg-Vorpommern, a border trade specialising in Scandinavian customers has developed, which is very important to the economically underdeveloped region.

The motion for amendment is intended to prevent the commercial basis from being withdrawn for the border trade and around 3 000 jobs that depend directly or indirectly on it in Schleswig-Holstein alone, and to prevent this from having an impact on tourism, which is very important to these regions.'

185 It is apparent from that passage that the reason for the motion for amendment in question was the protection of employment and economic activity linked to tourism in areas where the competent German regional authorities, in the *Länder* of Schleswig-Holstein and Mecklenburg-Vorpommern, began, at the same time as the introduction of that motion, to implement the derogation from the deposit scheme.

186 It is therefore probable that the reasons for that motion for amendment are also those which led to the non-charging of the deposit and the non-imposition of a fine.

187 That is evidence of the existence of serious difficulties, since it suggests that the interpretation of the VerpackV adopted by the competent German regional authorities bears no relation to the objective of environmental protection pursued by that legislation.

188 That evidence is all the more cogent because the only material element on which the Commission relies in the contested decision in order to determine the position of the competent German regional authorities is the report, referred to in paragraph 23 above, which was not compiled on their initiative, but that of the border shops.

189 Although, in paragraphs 50 and 53 of the contested decision, the Commission states that it sets out the interpretation by the competent German regional authorities of the VerpackV and, in particular, of the obligation to charge the deposit, it does not refer to any material evidence establishing that the position that it describes comes from those authorities and not from IGG or the border shops which it represents.

190 It may be inferred from the absence of such material evidence that the Commission did not carry out a full examination of the situation submitted to it, which also indicates the existence of serious difficulties (see, to that effect, judgments of 22 September 2011, *Belgium* v *Deutsche Post and DHL International*, C-148/09 P, EU:C:2011:603, paragraphs 83 to 86; of 10 February 2009, *Deutsche Post and DHL International* v *Commission*, T-388/03, EU:T:2009:30, paragraph 109; and of 20 June 2019, *a&o hostel and hotel Berlin* v *Commission*, T-578/17, not published, EU:T:2019:437, paragraphs 59, 67 and 99).

191 In the fifth place, the evidence concerning the scope, procedures for implementing and objectives of the measures at issue available to the Commission when it adopted the contested decision were not sufficient to enable it to conclude that there were no serious difficulties.

192 The non-charging of the deposit is not the result of an exception or exemption expressly provided for by the applicable legislation, nor of any guidelines on the application of that legislation. It is therefore apparent that it is an administrative practice, or even a mere concession the scope and content of which are far from clear. In particular, at the hearing, it was not stated, in reply to a question put by

the Court, that the detailed rules for the drawing-up, form and content of the export declaration were laid down by a measure issued by the competent German regional authorities. In the contested decision, the Commission did not attempt to remedy the lack of clarity surrounding the legal framework of the measures at issue by drawing up a detailed description of the provisions governing the derogation from the deposit scheme. On the contrary, it confined itself, in the main, to referring to certain evidence that had been sent to it by its interlocutors during the preliminary examination stage.

193 Moreover, the Commission did not refer, in the contested decision, to any material evidence establishing that the position it described in that decision originated from the competent German regional authorities and not from IGG or the border shops which IGG represents.

194 Furthermore, the Commission did not specifically state which bodies of the *Länder* of Schleswig-Holstein and Mecklenburg-Vorpommern had power to require border shops to apply the deposit and thus to decide to exempt them from it. Nor did it describe the manner in which the relevant decisions were adopted by those *Länder*.

195 The considerations set out in paragraphs 191 to 194 above support the conclusion that there was no sufficiently comprehensive and detailed examination by the Commission of the non-imposition of a fine, which constitutes further evidence of the existence of serious difficulties.

196 In the sixth place, in order to justify the application to border shops of an exemption from the obligation to charge the deposit which is not expressly provided for by the applicable legislation, the Commission reproduced in the contested decision (paragraphs 53 and 67) the analogy drawn by the competent German regional authorities between the situation of goods purchased in Germany by an end consumer for consumption outside that territory and that of goods exported outside Germany.

197 The soundness of such an analogy, which is supposed to provide justification for the criteria used in order to determine the authorised conduct, is not evident in view of the difference between the two situations concerned.

198 The applicant states, in that regard, that exported goods will, where appropriate, be subject to the deposit scheme applicable in the Member State to which they are exported, unlike the goods to which the contested measures apply, which are not subject to any deposit scheme.

199 This is a difference which appears both substantive and relevant.

200 Admittedly, the Commission states, without being contradicted, that the border shops had requested to join the Danish deposit scheme, but were not authorised to do so following opposition from the applicant.

201 However, the fact that such a factor, which could prove decisive for understanding the context in which the contested measures were implemented, was not even referred to in the contested decision supports the conclusion that the Commission did not carry out a full examination of the situation before it.

202 Moreover, the explanations provided by the Commission in that regard in its written pleadings are not very detailed. Furthermore, the Commission does not adduce any material evidence, but merely refers to a page, from which it does not refer to any passages, from the report referred to in paragraph 23 above.

203 It follows from the considerations set out in paragraphs 169 to 202 above that there is a body of evidence indicating the existence of serious difficulties which raise doubts as to the interpretation of the VerpackV adopted by the competent German regional authorities. That evidence leads, at the very least, to the conclusion that the Commission's examination of the situation before it was incomplete, which is in itself evidence of the existence of serious difficulties.

*(ii) The other arguments put forward by the Commission and IGG in order to dispute the existence of serious difficulties*

204 The finding that there were serious difficulties cannot be called into question by the Commission and IGG's other arguments.

205 In the first place, the Commission relies, in its written pleadings, on a decision which it previously adopted in a context which it considers to be comparable to that in the present case.

206 That is Decision C(2015) 3064 final of 8 May 2015 on State aid SA.34528 (2015/NN) (ex-2012/CP) – Estonia – Exemption from packaging deposit and packaging excise duty with respect to beverages delivered on board ships.

207 The Commission points out that, in that case, an exception to Estonian national legislation on packaging for take away sales of beverages in international waters on board ships bound for another Member State, was not considered to be aid.

208 It should be noted at the outset that, according to the case-law, the concept of aid is a legal concept and is to be interpreted in the light of objective factors. The classification of a measure as State aid cannot therefore depend on a subjective assessment by the Commission and must be determined regardless of any previous administrative practice of that institution, assuming that it is established (see judgment of 3 July 2014, *Spain and Others* v *Commission*, T-319/12 and T-321/12, not published, EU:T:2014:604, paragraph 46 and the case-law cited).

209 Next, it should be noted that, in the decision relied on by the Commission, the undertakings concerned were subject to excise duty if they did not meet the packaging recovery ratio laid down by Estonian national legislation (paragraph 9).

210 The Commission took the view, in paragraph 45 of the decision on which it relies, that the logic of the tax system at issue justified the exclusion of the relevant sales from the payment of excise duties. It concluded, in paragraph 46 of that decision, that the measure under examination did not constitute aid.

211 However, paragraph 45 of the decision relied on by the Commission does not concern the condition relating to State resources, but the condition relating to selectivity and, more specifically, the third stage of the method enabling national measures of a general nature to be distinguished from selective measures, a stage from which it may be concluded that there is no selectivity, even though the existence of a derogation from a general scheme has already been established, where that derogation arises from the nature or general scheme of the system of which the measure forms part (see, to that effect, judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraphs 55 to 58).

212 The Commission's argument is therefore irrelevant to the examination of the condition relating to State resources.

213 In addition, since they were applicable only if an undertaking engaged in behaviour which the State concerned was attempting to prevent, excise duties can, to a certain extent, amount to a penalty similar to the fine provided for in the present case where border shops do not apply the deposit scheme (see paragraph 4 above).

214 The Commission considered that the non-application of excise duty to the purchase of beverages which were sold in vessels bound for the territory of a Member State other than Estonia and which were not intended to be consumed immediately constituted a State resource (paragraph 42).

215 Consequently, not only is the Commission not justified in relying on the decision referred to in paragraph 206 above, but that decision could be regarded as a precedent running counter to the argument put forward in the contested decision.

216 In the second place, the Commission's suggestion that, in the absence of exhaustive harmonisation, the most appropriate solution for resolving the difficulties linked to the coordination of different national systems is the partial integration of shops located in a border area of a Member State into the deposit scheme of the neighbouring Member State, does not support the initial conclusion, without initiating the formal investigation procedure, that the non-charging of the deposit and the non-imposition of a fine does not constitute an advantage financed through State resources.

217 Whether or not a national measure falls within the scope of Article 107(1) TFEU does not depend on considerations relating to its appropriateness (see, to that effect, Opinion of Advocate General Léger in Joined Cases *Belgium and Forum 187* v *Commission*, C-182/03 and C-217/03, EU:C:2006:89, point 401), since the concept of State aid, as defined in the FEU Treaty, is a legal concept which must be interpreted on the basis of objective factors (judgment of 16 May 2000, *France* v *Ladbroke Racing and Commission*, C-83/98 P, EU:C:2000:248, paragraph 25).

218 In the present case, the fact, assuming it to be established, that there is a more appropriate solution than the application of the deposit scheme to border shops cannot automatically deprive the non-imposition of a fine of the status of aid if it is established that it also satisfies all the conditions laid down in Article 107(1) TFEU.

219 In the third place, the Commission's argument that the condition relating to State resources is not satisfied, since the applicant has not established the amount of fines which would have been payable if they had been imposed on border shops, must be rejected.

220 In accordance with settled case-law, no provision of European Union law requires the Commission, when it orders restitution of aid declared incompatible with the internal market, to fix the precise amount of the aid to be repaid. It is sufficient for the Commission's decision to include information enabling the recipient to work out himself, without overmuch difficulty, that amount (see judgment of 13 February 2014, *Mediaset*, C-69/13, EU:C:2014:71, paragraph 21 and the case-law cited).

221 A fortiori, it is not for the applicant, at the preliminary stage of the procedure in which the contested decision was adopted, to determine the exact amount of the aid, if necessary, to be repaid, since the examination of the measures at issue carried out at that stage is summary in nature (see, to that effect, judgments of 19 May 1993, *Cook* v *Commission*, C-198/91, EU:C:1993:197, paragraph 22; of 3 May 2001, *Portugal* v *Commission*, C-204/97, EU:C:2001:233, paragraph 34; and of 13 June 2013, *Ryanair* v *Commission*, C-287/12 P, not published, EU:C:2013:395, paragraph 71).

222 In the fourth place, IGG submits that it must be borne in mind that the competent German regional authorities are not required to impose a fine and can simply order an undertaking to change its behaviour under Paragraph 62 of the Life-Cycle Management Act. It adds that the competent German regional authorities take that approach when, as in the present case according to IGG, difficulties arise in interpreting the applicable legislation as regards the obligation to apply the deposit.

223 In that regard, it should be noted, first, that that line of argument is not referred to in the contested decision.

224 It is on the basis of the Commission's assessment, as it appears in the contested decision, and not from the arguments presented before the Court, that the existence of serious difficulties must be assessed. The question whether or not doubt exists requires investigation of the contents of the decision, comparing the assessments on which the Commission relied in the contested decision with the information available to it when it ruled (judgment of 24 January 2013, *3F* v *Commission*, C-646/11 P, not published, EU:C:2013:36, paragraph 31).

225 Secondly, in any event, Paragraph 62 of the Life-Cycle Management Act provides that the competent authorities may adopt individual coercive measures in order to enforce the provisions of that law and the decrees adopted for its implementation, including the VerpackV. It therefore has a very wide scope.

226 On the other hand, Paragraph 69(3) of the Life-Cycle Management Act provides for the imposition of a fine for certain specific offences, such as the non-application of the deposit scheme (see paragraph 4 above).

227 It is therefore unclear whether Paragraph 62 of the Life-Cycle Management Act, as '*lex generalis*', is intended to replace the '*lex specialis*' constituted by Paragraph 69(3) (see, to that effect, judgment of 19 June 2003, *Mayer Parry Recycling*, C-444/00, EU:C:2003:356, paragraph 57).

228 Thirdly, it may be assumed that, if an undertaking does not comply after having been, where appropriate, subject to an injunction issued on the basis of Paragraph 62 of the Life-Cycle Management Act, the competent authority would impose a fine on it in order to compel it to apply the deposit scheme.

229 Thus, the imposition of a fine appears, at the very least, to be a probable outcome should an undertaking persistently refuse to apply the deposit scheme.

230 The argument invoked by IGG must therefore be rejected.

231 In the fifth place, IGG relies on the judgment of 14 December 2004, *Radlberger Getränkegesellschaft and S. Spitz* (C-309/02, EU:C:2004:799), and, in particular, paragraph 46 of that judgment, from which it is apparent that a Member State which puts in place a deposit scheme must ensure that there are a sufficient number of return points so that consumers who have been charged a deposit when buying goods in non-reusable packaging can recover the deposit even if they do not go back to the initial place of purchase.

232 However, the judgment of 14 December 2004, *Radlberger Getränkegesellschaft and S. Spitz* (C-309/02, EU:C:2004:799), cannot lead to the conclusion that the systematic application of the deposit throughout the territory of a Member State, including in border areas, is contrary to the principle of the free movement of goods.

233 In the case which gave rise to the judgment of 14 December 2004, *Radlberger Getränkegesellschaft and S. Spitz* (C-309/02, EU:C:2004:799, paragraph 45), the only issue was whether a Member State could replace a system for the collection of packaging near the homes of consumers or points of sale with a deposit and return system, and the question of the implications of a deposit scheme for border areas was not taken into account by the Court.

234 Furthermore, it is not in dispute that consumers in the countries bordering Germany, in particular Denmark, who benefited from the deposit not being applied could, if it were applied to them, claim the deposit back from all German distributors (see paragraph 2 above), that is to say without having to return to the initial place of purchase.

235 It follows from all the considerations set out above that the existence of serious difficulties has been established.

*(3) Conclusion on the third part of the single plea in law*

236 The Court has found that the Commission's examination in the contested decision was vitiated by several errors and inadequacies and that there was other evidence supporting a finding that there were serious difficulties.

237 Consequently, the third part of the single plea in law, relating to the non-imposition of a fine, must be upheld.

238 Since the non-collection of VAT is inherent in the non-charging of the deposit, which is itself inseparable from the non-imposition of a fine on undertakings which do not charge the deposit, the contested decision must be annulled in its entirety (see, to that effect, judgments of 10 December 2002, *Commission* v *Council*, C-29/99, EU:C:2002:734, paragraph 45, and of 7 November 2012, *CBI* v *Commission*, T-137/10, EU:T:2012:584, paragraphs 311 to 313).

**Costs**

239 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

240 Since the Commission has been unsuccessful, it must bear its own costs and pay those incurred by the applicant and DN, which intervened in support of the form of order sought by the applicant, in accordance with the form of order sought by the applicant and DN.

241 In the absence of an application to that effect, IGG cannot be ordered to pay the costs of other parties. However, since it has intervened in support of the form of order sought by the Commission, it must bear its own costs, in accordance with Article 138(3) of the Rules of Procedure.

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

On those grounds,

THE GENERAL COURT (Fourth Chamber, Extended Composition)

hereby:

1. **Annuls Commission Decision C(2018) 6315 final of 4 October 2018 concerning State aid SA.44865 (2016/FC) – Germany – Alleged State aid to German beverage border shops;**

2. **Orders the European Commission to bear its own costs and to pay those incurred by Dansk Erhverv and Danmarks Naturfredningsforening;**

**3. Orders the Federal Republic of Germany and Interessengemeinschaft der Grenzhändler (IGG) to bear their own costs.**

Papasavvas Gervasoni Nihoul

Frendo Martín y Pérez de Nanclares

Delivered in open court in Luxembourg on 9 June 2021.

E. Coulon
Registrar

S. Papasavvas
President